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In The

Supreme Court of the United States

JOSEPH JASKOLSKI, et al.,

Petitioners,

v.

RICK DANIELS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States government requested Joseph Jaskolski, a private citizen, to interrogate grand jury witnesses, review criminal grand jury matters, and manage documents and witnesses at a federal criminal trial. It was undisputed that an FBI agent or U.S. Attorney was physically present and actually directed and supervised every detail of Jaskolski's work on the federal criminal case at every moment.

1. Did the Indiana Court of Appeals rule in conflict with *Logue v. United States*, 412 U.S. 521 (1973), *United States v. Orleans*, 425 U.S. 807 (1976) and *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932) by holding that Jaskolski was an "independent contractor" rather than an "employee of the government" and thus the United States had no authority whatsoever to supervise or control the manner in which Jaskolski interrogated federal grand jury witnesses, reviewed grand jury materials, or managed documents or witnesses at a federal criminal trial?

In *Logue* and *Orleans*, this Court held that an "employee of the government" as defined under 28 U.S.C. §2671 included "an employee of another employer" if the government was authorized to direct or supervise the detailed performance of that person's work.

2. Did the Indiana Court of Appeals rule in conflict with *Logue* and *Orleans*, including by superimposing on the definition of "employee of the government" the additional burden of proving the federal government "pressed [Jaskolski] into service" or "required" him to act?

LIST OF PARTIES

Defendants-Appellants and Petitioners: Joseph Jaskolski; National Insurance Crime Bureau (the "NICB").

Other Defendants: Liberty Mutual Insurance Company; Thomas Keer; Vehicle Investigations Nationwide, Inc.; Michael A. Evans, individually and d/b/a AIT Laboratories.

Plaintiffs-Appellees and Respondents: Rick Daniels, Anna Daniels.

Other Respondents: The United States of America. Jaskolski named the United States of America as a party to his Petition for Certification of Scope of Employment Pursuant to 28 U.S.C. §2679(d)(3) ("Petition for Westfall Certification"). The United States of America appeared and removed the case to federal district court, where it contested the Petition. After remand, the United States of America also filed in the Indiana state court a memorandum in response to Jaskolski's Motion for Ruling on his Westfall Petition. The United States of America obviously has an interest in the outcome of this Petition because if Jaskolski is certified as an "employee of the government," the United States will be substituted as a defendant. Therefore, the United States should be considered a respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The NICB is a not-for-profit corporation. It has no parent corporation. No publicly held company owns any stock in the NICB.

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Indiana, Case No. 2:06-CV-213, ruling on Jaskolski's Petition for Westfall Certification and remanding the case to Indiana state court is not in the official reporters but is reported at 2006 WL 2644949 and is at page 48 of the Appendix.

The opinion of the United States Court of Appeals for the Seventh Circuit finding that it had no jurisdiction to consider the district court's remand order is at 484 F.3d 884 and at page 65 of the Appendix.

The opinion of the Indiana Lake Superior Court, Case No. 45D01-0112-CT-193, ruling after remand on Jaskolski's Petition for Westfall Certification is not in the official reporters and is at page 44 of the Appendix.

The opinion of the Indiana Court of Appeals affirming denial of Jaskolski's Petition for Westfall Certification is at 905 N.E.2d 1 and at page 1 of the Appendix.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

The Indiana Court of Appeals issued its Opinion on April 24, 2009. (App. 1.) The Indiana Court of

Appeals denied Jaskolski's Petition for Rehearing on July 24, 2009. (App. 76.) The Indiana Supreme Court denied Jaskolski's Petition to Transfer on November 12, 2009. (App. 78.) Jaskolski timely filed this Petition within 90 days of November 12, 2009, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is the definition of "employee of the government" under 28 U.S.C. §2671:

> "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

STATEMENT OF THE CASE

The Government requested Jaskolski's help

On April 1, 1999, FBI Special Agent Timothy Campbell requested Joseph Jaskolski, an investigator for the NICB, to assist the federal government in a criminal investigation and prosecution of Kenneth Daniels for insurance fraud (the "Daniels case"). The government suspected Kenneth and his brother Rick Daniels intentionally destroyed Kenneth's recreational vehicle so that Kenneth could fraudulently recover the insurance. The government wanted to use Jaskolski's expertise in insurance fraud during its investigation and prosecution of the Daniels. (App. 142-43, 153-54.)

Jaskoiski agreed that the government had the authority to control him while working on the Daniels case

After April 1, 1999, Jaskolski participated in the Daniels case subject to the direction and control of Agent Campbell and Assistant United States Attorney ("AUSA") Clarence Butler. (App. 153-54.) "After that first meeting with the F.B.I., I was under the control of the U.S. Attorney and the F.B.I. My investigation stemmed from their order and their direction." (*Id.*) Specifically, the government and Jaskolski agreed that Jaskolski would be subject to and controlled by the policies, procedures, rules and regulations and laws of the federal government. (App. 143.)

In addition, Jaskolski and the government agreed that his participation in the Daniels case was specifically subject to the terms of a certification under Federal Rule of Criminal Procedure 6(e) Jaskolski had previously signed (the "Rule 6(e) statement"). (App. 143.) (Actually, the FBI and U.S. Attorney had requested Jaskolski to assist in the investigation of numerous cases of criminal insurance fraud over many years and Jaskolski signed a Rule 6(e) statement every three years that was applicable to all of his work for the government, including the Daniels case.) The Rule 6(e) statement provided that Jaskolski was subject to government rules and directives, that he could only assist the government in the enforcement of federal criminal law, and that he would be subject to contempt if he disobeyed the government's directives. (App. 162-64.) The U.S. Attorney's office filed the necessary notice of Jaskolski's involvement with the District Court pursuant to Rule 6(e)(3)(B), thereby giving notice to the district court and the public that Jaskolski was assisting the government in performing its law enforcement duties. (App. 90.)

Pursuant to the government's request and its detailed directives, Jaskolski worked side-by-side with Agent Campbell and AUSA Butler doing things only a government employee had the authority to do: interrogating grand jury witnesses, reviewing grand jury materials, and handling witnesses and documents at the criminal trial of Kenneth and Rick Daniels in *United States v. Daniels*, No. 2:00-CR-202,

United States District Court for the Northern District of Indiana. (App. 143-44.)

Jaskolski did only what he was told to do by either Agent Campbell or AUSA Butler. (App. 143-44, 153-54.) Agent Campbell or AUSA Butler always decided what particular result to achieve and also they alone decided to achieve that result in a particular way at a particular location at a particular time with particular documents or persons. (App. 144, 153-54, 160.) Jaskolski did not and could not exercise any independent judgment of his own. (App. 144-45.)

Agent Campbell or AUSA Butler controlled and directed every detail of Jaskolski's work on the Daniels case. For example, either Agent Campbell or AUSA Butler decided which witnesses to interview, and when and where to interview the witnesses. Agent Campbell would call Jaskolski and instruct him to assist in a witness interview. (App. 154-55, 158.) Jaskolski had to adjust his schedule to meet the needs of Agent Campbell or AUSA Butler. (App. 143-44.) The idea to interview a particular witness was not a joint idea but rather Agent Campbell's alone. (App. 144-45, 155-57, 159.) Agent Campbell was always physically present and directly supervised and directed Jaskolski during the interviews. (App. 144-45, 158-59.) Jaskolski always followed Campbell's lead and direction during the interviews. (App. 144-45, 156-57.) Agent Campbell and AUSA Butler exercised the same high degree of control over every other aspect of Jaskolski's work on the Daniels case: the government always supervised and directed every

detail of how Jaskolski reviewed documents or handled witnesses at trial. (App. 145-46.)

Indeed, the United States *admitted* Jaskolski always acted under the direct supervision or control of either Agent Campbell or AUSA Butler: Jaskolski's *"actions here were at the direction of the FBI and/or the United States Attorney's Office."* (App. 166.) The United States *admitted* that the FBI and the U.S. Attorney's office treated Jaskolski as "government personnel": "The government *acknowledges its action in treating Jaskolski as 'government personnel'. . . ."* (App. 166.)

Agent Campbell and AUSA Butler had the sole right and authority to terminate Jaskolski's participation in the investigation and prosecution of the Daniels case and could have exercised that right at any time for any reason. (App. 147-48.) From April 1, 1999 to the end of the Daniels' trial, Jaskolski was bound by the terms of the Rule 6(e) certification and consequently could not and did not report to anyone at NICB any information whatsoever regarding the investigation or prosecution of the Daniels other than to inform it of the general fact that he was involved in the investigation. (App. 146-47.) No one else at the NICB was certified under Rule 6(e) and consequently the NICB could not and did not exercise directly or indirectly any influence, control or review over Jaskolski's involvement in the investigation and prosecution of the Daniels. (App. 147.)

Daniels sued Jaskolski and others for malicious prosecution

Rick Daniels was ultimately found not guilty in the criminal case and then sued Jaskolski and the NICB (among others) in Indiana state court for malicious prosecution, Case No. 45D01-0112-CT-193. (App. 82-83.)

Jaskolski asked to be certified as an "employee of the government"

Shortly after being sued, Jaskolski asked the United States Attorney General to certify that Jaskolski, when assisting the government in the Daniels case, was acting as an "employee of the government" as defined in 28 U.S.C. §2671. (App. 94.) Although the government acknowledged it controlled every aspect of Jaskolski's involvement in the Daniels case, the Attorney General declined the request for certification in April 2006. (App. 85, 94.)

Jaskolski filed a Petition for Westfall Certification

On June 13, 2006, less than two months after his request to the Attorney General had been declined, Jaskolski and the NICB then filed in the Daniels' malicious prosecution action in Indiana state court his Petition for Westfall Certification. (App. 80.)

The federal district court's decision

The United States removed the action to federal court as allowed by 28 U.S.C. §2679(d)(3). Although the United States never presented any evidence in opposition and never disputed it directed every detail of Jaskolski's involvement in the investigation and prosecution of Rick Daniels, the federal district court denied certification because it interpreted "control" as requiring proof that the government could "coerce" Jaskolski to act against his will:

> "Although Jaskolski and the Government were clearly working together, there is no evidence in the record to show that the Government had the authority to control Jaskolski's day-to-day activities. Jaskolski may have voluntarily done everything Agent Campbell and AUSA Butler asked, but that does not mean that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will." (App. 62-63.)

The Seventh Circuit's decision

The United States Court of Appeals for the Seventh Circuit in *Daniels v. Liberty Mutual Ins. Co.*, 484 F.3d 884 (7th Cir. 2007) held it did not have appellate jurisdiction over the district court's remand order. The Seventh Circuit accordingly acknowledged that on remand the Indiana state courts should resolve anew – without giving any deference to the federal District Court's opinion – the question of

whether Jaskolski was an "employee of the government" under the Westfall Act. 484 F.3d at 888.

The Indiana trial court's decision

After remand, Jaskolski then requested the Indiana Lake Superior Court to rule on his previously filed Petition for Westfall Certification and to certify him as an "employee of the government" under the Westfall Act. (App. 97-141.) On July 28, 2008, the trial court denied certification, asserting that Jaskolski "failed to present evidence sufficient enough to prove that the Attorney General abused his discretion in refusing to grant him certification under the Westfall Act." (App. 46.)

The Indiana Court of Appeals' decision

Jaskolski appealed to the Indiana Court of Appeals, No. 45A04-0810-CV-00588. The Indiana Court of Appeals quoted and then essentially adopted the conclusion of the federal district court that Jaskolski had not proved the government had the authority to coerce him to act against his will: "There is no evidence that Jaskolski was pressed into service by the government." (App. 36.) According to the Indiana Court of Appeals, there could be no employment relationship if Jaskolski merely volunteered to accept the supervision of the government; instead, Jaskolski had to prove the government could require or force him to act:

> Undoubtedly, Jaskolski participated in the federal investigation and prosecution of the Danielses. But the fact that the government allowed him to participate in those proceedings is not equivalent to saying that his participation was required by an explicit or implicit employment relationship. Nor is Jaskolski following the wishes of Agent Campbell or AUSA Butler equivalent to the federal government controlling his activities with respect to the federal investigation and prosecution of the Danielses. (*Id.*)

The Indiana Court of Appeals concluded that, "while Jaskolski participated in the federal government's investigation and prosecution of the Danielses, he did so as a volunteer and an independent contractor and not as a federal employee." (Opinion, p. 38.)

REASONS FOR ALLOWANCE OF THE WRIT

1. The Indiana Court of Appeals' holding that the government had no authority to supervise Jaskolski's activities such as interrogating grand jury witnesses is in conflict with *Logue* and *Orleans* and will disrupt the federal criminal justice system.

The Indiana Court of Appeals reached the untenable conclusion that Jaskolski acted as an independent contractor and thus the United States *had no authority whatsoever* to direct or supervise Jaskolski's work on the Daniels case. Such a

conclusion is not only in direct conflict with *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976) but is also so manifestly dangerous as to require this Court to exercise its supervisory power. Under the Indiana Court of Appeals' ruling, volunteers such as Jaskolski will now have license to wreak havoc and the Justice Department will only be able to express its "wishes" that the volunteers not do so.

An independent contractor is a person who contracts with another to do something for him but who is not subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. *Logue*, 412 U.S. at 527 n.5 (1973); *Orleans*, 425 U.S. at 814-15; Restatement (Second) of Agency, §2. In both *Logue* and *Orleans*, this Court found that a particular person was an "independent contractor" rather than a federal agency or an "employee of the government" precisely because the government did not have the authority to supervise the details of the work. *Logue*, 412 U.S. at 529-32; *Orleans*, 425 U.S. at 818.

Therefore, by concluding that Jaskolski was an independent contractor, the Indiana Court of Appeals also explicitly ruled that the United States *had no authority whatsoever* to supervise or control the manner and method in which Jaskolski performed his work on the Daniels case. According to the Indiana Court of Appeals, FBI Agent Campbell or AUSA Butler could only express their "wishes" but could not

control whether Jaskolski complied with their directions.

Consequently, under the Indiana Court of Appeals' ruling, Jaskolski necessarily was free, for example, to conduct the interrogation of grand jury witnesses in any manner he saw fit. Even if he began to engage in improper methods of questioning a witness, the government could only express its "wish" that he not do so but had *no authority* to direct him not to.

Indeed, one of the central claims raised by Daniels in the state court malicious prosecution action relates to Jaskolski's role in the initial interview of Rick Daniels. FBI Agent Campbell directed Jaskolski to accompany him to the interview and was physically present to supervise and direct any participation by Jaskolski in the questioning. Jaskolski testified he obeyed and followed FBI Agent Campbell's directions at that interview. Can anyone seriously suggest Jaskolski could have ignored the directions of FBI Agent Campbell and proceeded to subject Daniels to waterboarding in order to extract a confession? Can anyone seriously suggest FBI Agent Campbell was powerless to prevent Jaskolski from doing so? Under *Logue* and *Orleans*, the government obviously had the authority to control Jaskolski during the interview and had the ability to make sure Jaskolski obeyed its orders. The Indiana Court of Appeals' ruling to the contrary that Jaskolski acted as an independent contractor is an absurd result unsupported by any precedent or reason.

The Indiana Court of Appeals' holding that the government had no authority to control Jaskolski's work on the Daniel's case merely because he was not "pressed into service" but rather volunteered can only result in either mischief or severe disruption of the federal criminal justice system – as well as any other governmental program that enlists volunteers. Either volunteers such as Jaskolski will be entitled to claim under the Indiana Court of Appeals' decision that they have the freedom to do their work as they see fit without regard to any attempt by the government to supervise the manner and method of work, or the government will be forced to stop using volunteers. Neither result is acceptable.

Therefore, the Court should grant this Petition and reverse the judgment of the Indiana Court of Appeals. Indeed, the Indiana Court of Appeals' ruling that Jaskolski acted as an independent contractor is so glaringly wrong as to justify summary reversal under Supreme Court Rule 16.1.

2. The Indiana Court of Appeals holding that the government had no authority to control Jaskolski's participation in the investigation and prosecution of federal crimes is in conflict with *Denton*.

The Indiana Court of Appeals' notion that the government had no authority to direct or supervise Jaskolski's work on the Daniels case is not only absurd but also in conflict with this Court's prior

holding in *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932). At the very least, the idea that the government has no authority to control volunteers participating in the interrogation of grand jury witnesses or reviewing grand jury materials is one of first impression and of great importance to the Justice Department and thus should be decided by this Court rather than the Indiana Court of Appeals.

In *Denton*, this Court recognized that when a government employee gives direction to another person, the right to "control" is implicit in the direction. *Id.* at 310. The government employee's direction would be practically meaningless unless it comprehended the power to supervise and control the response. This Court thus held that the direction of the government employee carried with it the duty, on the part of the people directed, to obey, and had, and was intended to have, the force of a command. *Id.* The Court concluded that the person directed by the government employee was acting under the control of the government and thus was a loaned employee of the government.

In this case, as in *Denton*, it is undisputed that beginning April 1, 1999, Jaskolski did things that only the government could do and which the government could not delegate to others unless it retained complete control: investigating and prosecuting federal crimes. The federal government has the *exclusive* authority to control all activities in the investigation and prosecution of federal crimes and therefore necessarily had the inherent and exclusive

authority to control anything Jaskolski did on the Daniels case. There is nothing in the law that would allow the United States to delegate that duty to a private citizen without retaining complete control.

Jaskolski had no authority of his own to interrogate witnesses to a federal crime. Likewise, Jaskolski had no authority of his own to handle witnesses or documents before a grand jury. Jaskolski had no authority of his own to handle witnesses or documents at a criminal trial in the District Court. Jaskolski could do all of these things only at the request of and pursuant to the authority and control of the government.

Therefore, the government necessarily had the inherent and exclusive authority to control Jaskolski's involvement in the Daniels case. Just as in *Denton*, the directions of FBI Agent Campbell and AUSA Butler to Jaskolski would have been meaningless unless they included the right to control Jaskolski's compliance with those directions. As in *Denton*, the directions were not merely a "wish" that could be ignored or disobeyed. Therefore, under *Denton*, that the government physically supervised and directed the details of all of Jaskolski's activities demonstrated it had the right to control Jaskolski's compliance with those directions.

3. The Indiana Court of Appeals ruled in conflict with *Logue* and *Orleans* by superimposing the additional and impossible burden of proving the government could require Jaskolski to act against his will.

Clearly, Jaskolski did not participate in the Daniels case as an independent contractor with full discretion to interrogate witnesses as he saw fit; instead, he acted as an "employee of the government" under the Westfall Act. The Indiana Court of Appeals' ruling that Jaskolski did not act as an "employee of the government" because he purportedly failed to prove the government "pressed [him] into service" and "required" him to act is in conflict with this Court's decisions in *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976). By superimposing such an unprecedented burden of proof onto the definition of "employee of the government" in 28 U.S.C. §2671, the Indiana Court of Appeals effectively amended the statute by judicial fiat to exclude volunteers.

The Westfall Act defines an "employee of the government" to include any "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. §2671. The definition of "employee of the government" thus includes an employee of a non-governmental employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement, even if the loaned employee is not on

the government's payroll. *Logue v. United States*, 412 U.S. 521, 531, 93 S.Ct. 2215, 2221 (1973); *Patterson & Wilder Constr. Co. v. United States*, 226 F.3d 1269, 1274 (11th Cir. 2000).

Moreover, the definition of the term "employee of the government" incorporates the common law definition of master-servant. *Orleans*, 425 U.S. at 814; *Logue*, 412 U.S. at 527-28, 531. Accordingly, the critical factor in determining whether one is a "person acting on behalf of a federal agency in an official capacity" is whether the government was authorized to direct or supervise the detailed performance of that person's work. *Orleans*, 425 U.S. at 814; *Logue*, 412 U.S. at 527-28.

Furthermore, under the holding in *Logue* and *Orleans* that the definition of "employee of the government" incorporates the common law, the employment relationship extends to situations in which the servant is a volunteer acting under a similar degree of control as a paid employee. See, *e.g.*, *Beul v. Asse International, Inc.*, 233 F.3d 441, 444 (7th Cir. 2000); *Southport Little League v. Vaughan*, 734 N.E.2d 261, 268 n.6 (Ind.App. 2000) (unpaid volunteer was "employee" of Little League); *Colorado Compensation Ins. Authority v. Jones*, 131 P.3d 1074, 1080-81 (Col.App. 2005) (unpaid assistant was employee); *Buisker v. Thuringer*, 648 N.W.2d 817, 820-21 (S.D. 2002) (friend assisting in removal of addition was gratuitous employee); Restatement (Second) of Agency, §225 (volunteer may be employee). (The Restatement (Second) of Agency is a particularly

valuable source in further defining "employee" as necessary. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).)

Therefore, under *Logue* and *Orleans* and the common law, it is sufficient to establish an employment relationship that a volunteer freely consented to obey the directives of the employer as to the details of the work. Nothing in the law requires the employee or volunteer to prove that the employer had the authority to require the employee to act or to coerce the employee to act against his will.

Under the law set forth in *Logue* and *Orleans*, there can be no question Jaskolski fell within the Westfall Act's definition of "employee of the government." It was undisputed that FBI Agent Campbell or AUSA Butler was physically present and had the authority to direct and supervise every detail of Jaskolski's work on the Daniels case at every moment. For example, either Agent Campbell or AUSA Butler decided which witnesses to interview, and when and where to interview the witnesses. Agent Campbell could call Jaskolski and instruct him to assist in a witness interview and Jaskolski had to adjust his schedule accordingly. The idea to interview a particular witness was not a joint idea but rather Agent Campbell's alone. Agent Campbell was always physically present and directly supervised and directed Jaskolski during the interviews and Jaskolski always followed those directions. Agent Campbell and AUSA Butler exercised the same high degree of control over every other detail of Jaskolski's

work on the Daniels case. In short, the government dictated the details and the manner – including the when, where, who, what and how – of every aspect of Jaskolski's work on the Daniels case.

Moreover, the United States *admitted* Jaskolski always acted under the direct supervision or control of either Agent Campbell or AUSA Butler: Jaskolski's "*actions here were at the direction of the FBI and/or the United States Attorney's Office.*" (App. 166.) The United States *admitted* that the FBI and the U.S. Attorney's office treated Jaskolski as "government personnel." (*Id.*)

It is also undisputed the government and Jaskolski agreed upfront *before* the investigation even began that Jaskolski would obey the directions of Agent Campbell and AUSA Butler *and* the terms of the Rule 6(e) certification *as well as* all policies, procedures, rules, regulations and laws of the federal government. (App. 143-44.) Therefore, by their *mutual agreement*, the government had the authority to control the details of Jaskolski's work on the Daniels case. Even if the parties had not agreed beforehand, both orally and in writing, that the government would control the details of Jaskolski's work on the Daniels case, that the government actually directed the details of Jaskolski's participation in the investigation and prosecution of the Daniels *as it occurred* and Jaskolski obeyed those directions established the government had the authority to control the details of Jaskolski's work. Restatement (Second) of Agency, §7, comments a, b;

§15, comments a, b; §26, comments a, b, c. Actions manifest consent as much as words.

However, the Indiana Court of Appeals held that it was not enough for Jaskolski to satisfy the test set forth in *Logue* and *Orleans* by proving that the government gave all the orders and that Jaskolski voluntarily agreed to obey the "wishes" or orders of the government as to every detail of his work on the Daniels case. Instead, the Indiana Court of Appeals superimposed on top of §2671 and the law of *Logue* and *Orleans* the additional burden of proving the government "pressed him into service" or that the government "required" him to act. (App. 36.) The Indiana Court of Appeals thereby accepted the contention of the federal district court (after the United States removed the case and before it was remanded to state court) that Jaskolski had to prove "that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will." (App. 62-63.)

The extra burden superimposed by the Indiana Court of Appeals of proving the government had the power to coerce Jaskolski is not found in either *Logue* or *Orleans* or anywhere else in the law. No case law or authority has ever suggested an employer has the right to press anyone into service or to require, force, compel or coerce an employee to do anything against his will. To the contrary, under the common law as incorporated into the definition of "employee of the government" under *Logue* and *Orleans*, the employment relationship is based on consent, not coercion.

As the Indiana Court of Appeals' opinion demonstrates, the use of the term "control" in defining the employment relationship requires further explanation. Indeed, the use of the term "control" is unfortunate. People are neither puppets nor, since passage of the Thirteenth Amendment to the United States Constitution, slaves. American jurisprudence does not recognize the right of any human being to *control* another human being, particularly in the sense of the "master" being able to coerce or compel the "servant" to act against his will.

Rather, the law makes it clear that the employment relationship is based entirely on consent, not coercion or force. The Restatement (Second) of Agency defines agency as a "relation which results from the *manifestation of consent* by one person to another that the other shall act on his behalf and subject to his control, and *consent* by the other so to act." Restatement, §1. Comment a of Section 1 further states, "the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other *consents* so to act." Section 32 of the Restatement further clarifies that the agency relationship is "consensual."

Section 220 of the Restatement provides that a "servant" is defined by "the extent of control which, *by the agreement*, the master may exercise over the details of the work." Section 220, comment h, further defines the right to control as "*an agreement* for close supervision or *de facto* close supervision of the

servant's work." Sections 7, 15, 26, 32, 43 and 221 of the Restatement also further illustrate how the master's authority to control, and the servant's authority to act on behalf of the master, is created by the parties' manifestation of *consent*.

Accordingly, to establish the right to "control," "[i]t is only necessary that there be submission by the one giving service to the directions and control of the one receiving it as to the manner of performance." Restatement (Second) of Agency, §221, comment c. An employee's acquiescence to the employment relationship can be established merely by showing that the employee freely accepted instruction from the employer. *Cromer v. Joseph Behr & Sons, Inc.*, 845 F.Supp. 572, 579 (N.D.Ill. 1994). Even though a volunteer need not volunteer in the first place and may refuse to do what he is directed to do and quit if he does not want to perform the services suggested, he is nonetheless an employee as long as he works under the direction and control of his employer. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 536 P.2d 697, 703 (Ariz. 1975).

In summary, there is a "master-servant" or employment relationship if one party (the employer) *requests* that another party (the employee or volunteer) act on the master's behalf and subject to his direction and the volunteer or employee *agrees* to do so. It is *the agreement or consent between the parties* that both grants and defines the employer's authority to direct the details of performance.

Therefore, there is no support in the law for the Indiana Court of Appeals' assertion that Jaskolski had to prove the government "pressed him into service" or that the government could "require" him to act against his will. Indeed, the Indiana Court of Appeals' contention is directly contrary to the common law as engrafted onto the definition of "employee of the government" under *Logue* and *Orleans*.

The Indiana Court of Appeals' suggestion that "Jaskolski's arguments would require this court to conclude that anyone who cooperates with a federal prosecutor is immune from liability as if he or she is a federal prosecutor" is a *non sequitur*. The question of whether Jaskolski "cooperated" with the government is an overly broad judicial gloss that merely skims the surface of the real issue. Every employee of the government, including FBI Agent Campbell and AUSA Butler, can be said to "cooperate" with the government. The real question is much deeper and more particular: within the broad context of such cooperation, did the government have the authority to supervise and direct the details of the manner or method of Jaskolski's work on the Daniels case. Jaskolski did not merely "cooperate" with the prosecutor by, for example, providing information solely within his own knowledge such as an informant would do, or by performing tasks outside the physical supervision and direction of the prosecutor. Instead, FBI Agent Campbell and AUSA Butler physically supervised and directed every detail of the manner

and method of Jaskolski's work on the Daniels case. That is much more than cooperation.

There is no question that if either Agent Campbell or AUSA Butler had themselves done what they directed Jaskolski to do, Campbell and Butler would have been entitled to the protections of the Westfall Act as "employees of the government." The law and justice require that Jaskolski – who was only an extra hand under the complete control of Campbell and Butler – be certified as an "employee of the government" under the Westfall Act as well so that the federal government can take responsibility for what were, in essence, its own acts.

4. The Indiana Court of Appeals' decision will have an adverse impact on the United States' ability to enlist the aid of volunteers, thereby impairing the government's performance of its functions.

The Indiana Court of Appeals' decision will have an adverse impact on the United States' regular and widespread practice of enlisting the aid of volunteers in order to perform its functions. The United States regularly enlists the aid of volunteers in order to perform its functions. Jaskolski has been working under the supervision of the FBI and U.S. Attorney's office on select cases for many years. And obviously, NICB investigators other than Jaskolski work closely with the Justice Department across the country. See https://www.nicb.org/our_departments/field_operations;

http://www.chirobase.org/08Legal/Ins/CA01.html. And the NICB is not the only entity that volunteers to assist the Justice Department. Moreover, many if not all government agencies enlist the aid of volunteers in order to perform their functions. See http://volunteer.gov/gov/.

The Indiana Court of Appeals' decision jeopardizes the government's ability to enlist the aid of such volunteers. If the Indiana Court of Appeals' decision is allowed to stand, then no volunteer will be able to establish that he or she is an "employee of the government" because it is impossible to prove that the government has the authority to require or force its employees or volunteers to act against their will. Employers – including the United States – have not had the authority by virtue of the employment relationship to coerce employees or volunteers since the passage of the Thirteenth Amendment.

Consequently, under the Indiana Court of Appeals' opinion, no volunteer will ever be entitled to any of the immunities afforded under the Westfall Act, no matter how closely the government controls the volunteer's work. Rational individuals will not volunteer to work for the government if, by agreeing to obey the orders of the government as to the method or manner in which they must work, they will subject themselves to ruinous tort liability while the federal employees who gave the orders will remain immune from liability.

5. The Indiana Court of Appeals' pernicious suggestion that an employer has the right to coerce an employee or volunteer should not be allowed to stand.

The Indiana Court of Appeals' unprecedented assertion that Jaskolski had to prove the government "pressed him into service" and had the authority to "require" or force him to act – even against his will – necessarily carries with it the pernicious suggestion that the government, or any employer for that matter, can lawfully manhandle or coerce its employees. Again, at least since passage of the Thirteenth Amendment, no employer has had the right to coerce an employee or volunteer. The implication of the Indiana Court of Appeals' opinion that an employer has the right to force an employee to act against his will is so abhorrent to American law that this Court should not allow it to stand.

CONCLUSION

The Court should grant this Petition for a writ of certiorari to make clear that the federal government has the authority to supervise persons like Jaskolski who work for federal agencies such as the FBI or U.S. Attorney and who perform purely non-delegable governmental tasks such as investigating and prosecuting federal crimes or more particularly interrogating grand jury witnesses. Such tasks cannot and never should be delegated to persons outside of the government unless it is clear to everyone involved

that the government retains the authority to directly supervise and control the details of those tasks. The Indiana Court of Appeals' ruling, if allowed to stand, precludes such clarity.

Wherefore, Petitioners Joseph Jaskolski and the National Insurance Crime Bureau respectfully pray that this Honorable Court grant this Petition and issue a writ of certiorari to the Indiana Court of Appeals, and that this Court order the reversal of the April 24, 2009 decision of the Indiana Court of Appeals, and enter in lieu thereof a judgment certifying that Jaskolski was an "employee of the government" under 28 U.S.C. §2671 with regard to all of his activities related to the Daniels case beginning April 1, 1999, and ordering the substitution of the United States as a party defendant in place of Jaskolski for all allegations regarding Jaskolski's activities after April 1, 1999, and granting such other relief as this Court deems just.

Respectfully submitted,

Joseph Jaskolski and the
National Insurance Crime Bureau

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IN THE COURT OF APPEALS OF INDIANA

JOSEPH JASKOLSKI, NATIONAL INSURANCE CRIME BUREAU, LIBERTY MUTUAL INSURANCE COMPANY, TOMAS KEER, VEHICLE INVESTIGATIONS NATIONWIDE, INC., and MICHAEL E. EVANS, individually and d/b/a AIT LABORATORIES,	)	No. 45A04-0810-CV-588
Appellants-Defendants,	)	
vs.	)	
RICK DANIELS and ANNA DANIELS,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0112-CT-193

April 24, 2009

OPINION – FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE[1]

Joseph Jaskolski and the National Insurance Crime Bureau ("NICB") bring this interlocutory appeal from the trial court's denial of their Petition for Certification under the Federal Employees Liability Reform and Tort Compensation Act of 1998, commonly known as the Westfall Act. *See* 28 U.S.C. § 2679 (2009). The Westfall Act provides that the remedies available under the Federal Tort Claims Act ("FTCA")[2] in civil actions against the United States shall be exclusive. 28 U.S.C. § 2679(a). That is:

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[1] We held oral argument in this matter on March 25, 2009. Also, Liberty Mutual Insurance Co., Tomas Keer, Vehicle Investigations Nationwide, Inc., Micheal A. Evans, and AIT Laboratories have not filed appearances or briefs with this court. Nonetheless, they are parties of record in the trial court, and they are therefore parties on appeal. *See* Ind. Appellate Rule 17(A).

[2] The FTCA is codified at 28 U.S.C. § 1346 and 28 U.S.C. §§ 2671-2680 and generally represents Congress' express waiver of sovereign immunity for claims arising out of torts committed by federal employees.

> injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1). If the federal employee is being sued for conduct that occurred while the employee was acting within the scope of his or her employment, "[t]he Attorney General shall defend . . . [the] employee. . . ." 28 U.S.C. § 2679(c). However, before the United States or U.S. Attorney General will take part in a civil action on behalf of a purported employee, that employee must obtain certification from the Attorney General that the employee falls within the protections of the Westfall Act:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at

any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) *In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment.* Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. *In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is*

> *pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.*

28 U.S.C. § 2679(d) (emphases added).

Here, the Danielses sued Jaskolski, the NICB, and others in an Indiana court, alleging malicious prosecution, among other things. Jaskolski and the NICB sought certification from the U.S. Attorney General that Jaskolski was an employee of the federal government for purposes of that lawsuit. The Attorney General denied their request for certification, but the Attorney General removed the action to the United States District Court for the Northern District of Indiana for review of that decision. That court affirmed the denial of certification and remanded the Danielses' action to the Indiana trial court, and, on appeal, the United States Court of Appeals for the Seventh Circuit held that it did not have jurisdiction to review the district court's remand order.[3] On remand in the Lake Superior Court, Jaskolski and the NICB again raised the issue of his status as a federal employee. The trial court declined to certify Jaskolski as a federal employee, and, in this interlocutory appeal, the parties raise numerous

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[3] As discussed in detail below, this was actually the second decision of the Seventh Circuit in this matter.

arguments for review. We consolidate those arguments into the following two issues:

> 1. Whether Jaskolski and the NICB's appeal is properly before this court.
>
> 2. Whether Jaskolski is a federal employee under the Westfall Act.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts at issue in this appeal were summarized by the United States District Court for the Northern District of Indiana:

> Jaskolski is an investigator with the [NICB]. In this action, Jaskolski and the NICB have filed a petition seeking an order declaring that Jaskolski was an "employee of the government" under 28 U.S.C. section 2671[4] during a grand jury investigation and criminal prosecution of Plaintiff, Rick Daniels. The Federal Employee Litigation Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (the "Westfall Act"), provides a procedural mechanism to ask the Attorney General to determine the

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[4] Section 2671 of title 28 of the United States Code provides, in relevant part: "'Employee of the government' includes (1) officers or employees of any federal agency, . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. . . ."

scope of employment and then petition this Court to review the Attorney General's decision. Jurisdiction is therefore present under 28 U.S.C. section 2679(d)(3).

The NICB is a not-for-profit organization funded by insurance companies to investigate and detect instances of insurance fraud. During the course of his salaried employment with the NICB, Jaskolski worked with the FBI and the United States Attorney's Office on the investigation of Rick Daniels and Kenneth Daniels stemming from an insurance claim that arose from an October 23, 1998[,] motorhome fire. As a result, Rick and Kenneth Daniels faced a multi-count criminal prosecution in the case captioned *United States of America v. Daniels, et al.*, case number 2:00-CR-202, in this Court.

A jury trial was held, and the Daniels[es] were acquitted of their criminal charges. Thereafter, [on December 28, 2001,] Rick Daniels and his wife Anna Daniels filed two state court actions which were consolidated into this 15-count lawsuit in Lake [ ] Superior Court (Cause No. 45D01 0112 CT 193), alleging that NICB, Jaskolski, and other parties maliciously prosecuted the Daniels[es] by intentionally causing the federal criminal prosecution to be instituted against them. [In 2006,] Jaskolski and the NICB notified the United States Attorney of the suit under 28 U.S.C. section 2679(c), and asked the United States Attorney to certify that Jaskolski was acting as an "employee of

the government" as defined in 28 U.S.C. section 2671. The United States Attorney sent the request to the Department of Justice in Washington, D.C., the Associate Attorney General considered the request, and declined to issue the section 2679 certification. This case was removed to this Court so the petition for determination of the scope of employment of Jaskolski could be decided by this Court.

During Jaskolski's investigation and participation in the prosecution of the Daniels[es], Jaskolski was a salaried employee of the NICB. The NICB received a request from Liberty Mutual Insurance Company to investigate an insurance claim that had been made by Liberty Mutual's insureds, the Daniels[es]. Jaskolski opened a case file, gathered information for three or four weeks, then contacted the [FBI]. On April 1, 1999, Jaskolski met with Special Agent Timothy Campbell to discuss the Daniels[es'] insurance claim. At that meeting, Agent Campbell decided to request that the United States Attorney's office open a criminal investigation into the claim, and he also asked Jaskolski to assist in the investigation. Jaskolski described the relationship as a joint investigation with the FBI. Jaskolski was never paid by the FBI.

Jaskolski contends he was acting under the supervision of the FBI because he

executed a certification pursuant to Federal Rule of Criminal Procedure Rule 6(e).[5] In a related case, *Jaskolski v. Daniels, et. al.*, 2:03-cv-479, pending in this Court, an issue arose regarding whether Jaskolski was required to disclose grand jury materials pursuant to Federal Rule of Criminal Procedure 6. During his investigation, Jaskolski had access to grand jury information and the United States Attorney's Office treated Jaskolski as if he fell within the provision of Rule 6(e)(3)(A)(ii) that permits disclosure of grand jury matters to government personnel, and filed a notice of disclosure with the Court pursuant to Rule 6(e)(3)(B). During the course of discovery in the state court action, the Daniels[es] sought disclosure of materials that Jaskolski claimed were grand jury materials, and Jaskolski argued that the Daniels[es] had to follow the procedures of Rule 6 to obtain disclosure of the materials. Instead, the Daniels[es] filed two motions to compel in the state court

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[5] Federal Rule of Criminal Procedure 6(e)(3)(A) states that "[d]isclosure of a grand-jury matter . . . may be made to: . . . (ii) any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law. . . ." That Rule then states that "[a] person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law" and that the federal attorney in the matter must disclose to the court "the names of all persons to whom a disclosure has been made." Fed. R. Crim. P. 6(e)(3)(B).

proceeding, and the motions were granted. In response, Jaskolski and the NICB filed the federal case, cause number 2:03-cv-479, requesting a preliminary injunction.

In an order dated August 31, 2004, this Court granted the motion for preliminary injunction.[6] The issue for that motion was whether Jaskolski was "government personnel" in the criminal prosecution – for, if he was, then he "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). In ruling on the motion for preliminary injunction, this court specifically declined to consider the definition of "employee of the government" of the [FTCA] in considering if Jaskolski was "government personnel" under Rule 6, because Jaskolski and the NICB provided no persuasive justification for using the FTCA's definition [rather than the definition in Rule 6]. *See Jaskolski v. Daniels,* 2:03-CV-479, slip op., at 6 n.2. This Court reasoned that it was more likely than not that Jaskolski did not fit within the definition of "government personnel" under Rule 6, but concluded "that any grand jury information disclosed to

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[6] The Anti-Injunction Act, 28 USC § 2283, states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Danielses did not raise the Anti-Injunction Act as a defense in the federal district court proceedings.

Jaskolski should not be freely divulged merely because the Government may have erred, in good faith, by treating Jaskolski as 'government personnel.'" The Seventh Circuit affirmed this decision in *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005) ["*Daniels I*"[7]], noting that although the parties wanted the Court "to determine the proper classification of private insurance investigators under Rule 6(e)(3)(A)(ii)," the Court declined to decide whether Jaskolski acted as "government personnel" finding:

> Disclosure was made to Jaskolski under Rule 6(e)(3)(A)(ii). Whether the disclosure was made "properly" or "correctly" is neither here nor there. Rule 6(e)(2)(B) asks whether disclosure has been "made under" a particular subsection, not whether the subsection was applied correctly. This protects the prosecutor's (and the witnesses') reliance interests and prevents a blunder from opening the investigatory files.

Id. at 459, 461. Thus, neither this Court nor the Seventh Circuit directly ruled upon whether Jaskolski was "government personnel"

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[7] Our numbering of the various federal decisions in this matter is in accordance with the chronology of the current litigation. The numbered, prior decisions of the federal courts were not final decisions on the merits of the Danielses' claims against Jaskolski and the NICB.

for the purposes of Rule 6 (much less have the Courts ruled upon whether Jaskolski was an "employee of the government" under the FTCA).

Returning to the investigation at issue, Special Agent Timothy Campbell of the FBI asked Jaskolski to assist in the investigation. According to Jaskolski, it was clear to him that any assistance he provided would be subject to the terms of the Rule 6(c) certification he had previously signed.[8] Jaskolski attests in his affidavit that[,] generally, he assisted in the following areas:

a. Accompanied Agent Campbell on interviews of witnesses;

b. Accompanied Agent Campbell on site or other inspections;

c. Assisted in reviewing documents as directed;

d. Assisted in escorting of witnesses at grand jury proceedings;

e. Assisted United States Attorney Clarence Butler at trial.

With regard to those activities, Jaskolski claims he "did only what [he] was told to do by either Agent Campbell or AUSA Butler, or

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[8] Jaskolski signed this certification form on August 24, 1998, almost three months before Liberty Mutual contacted the NICB about the Danielses.

other FBI agents and U.S. Attorneys." Additionally, Jaskolski claims he acted "under the direct supervision or control of either Agent Campbell or Agent Butler" and that they "always decided what particular result to achieve and they alone decided also to achieve that result in a particular way at a particular location at a particular time with particular documents or persons." Jaskolski "did not and could not exercise any independent judgment of [his] own with regard to any aspect of the investigation, indictment or prosecution of the Daniels[es]." He interviewed only those witnesses directed by Agent Campbell or AUSA Butler, and one of them was always physically present and directly supervising or directing Jaskolski. Similarly, Agent Campbell or AUSA Butler decided what documents to subpoena or obtain, as well as the inspections to conduct.

At trial, Jaskolski assisted Agent Campbell or AUSA Butler according to their directions (such as requests for documents or other information). At the trial, Jaskolski sat at counsel table, but was introduced as a representative of the NICB. Jaskolski considered himself a part of the prosecution team. Jaskolski did not report to anyone at the NICB any information regarding the Daniels[es] investigation or prosecution, and no one at the NICB influenced his investigation and prosecution of the Daniels[es]. While Jaskolski worked on the Daniels[es'] case, he also worked on other cases assigned to him by his supervisor at the NICB.

Daniels v. Liberty Mut. Ins. Co., No. 2:06-CV-213, 2006 U.S. Dist. LEXIS 65896, at *2-*10 (N.D. Ind. Sept. 14, 2006) (citations to the record omitted; some alterations original) ("*Daniels II*"). After reviewing those facts and relevant law, the district court held that Jaskolski was not an employee of the federal government for purposes of the Westfall Act. The court then remanded the matter to the Lake Superior Court for further proceedings on the Danielses' malicious prosecution action against Jaskolski and the NICB. *See* 28 U.S.C. § 2679(d)(3).

Jaskolski and the NICB appealed the district court's remand order to the United States Court of Appeals for the Seventh Circuit. Writing on behalf of that court, Chief Judge Easterbrook noted that, generally, a district court's decision to remand an action to state court is not reviewable by a federal court of appeals. *Daniels v. Liberty Mut. Ins. Co.*, 484 F.3d 884, 886 (7th Cir. 2007) (discussing 28 U.S.C. § 1447(d), which states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise") ("*Daniels III*"). However, the Seventh Circuit then noted that in *Osborn v. Haley*, 549 U.S. 225 (2007), the Supreme Court of the United States held that the Westfall Act makes an exception to that general rule in very limited circumstances, namely, where the U.S. Attorney General has certified a civil defendant as an employee of the federal government but the district court remands the action to state court anyway. *Daniels III*, 484 F.3d at 886-87 (discussing *Osborn*,

549 U.S. at 240-45). Because the Attorney General did not certify Jaskolski as a federal employee under the Westfall Act, the *Daniels III* court held that the exception found in *Osborn* did not apply in Jaskolski and the NICB's appeal. Accordingly, the court dismissed their appeal for lack of jurisdiction, stating:

> As we reminded Jaskolski the last time [in *Daniels I*], state courts are competent to resolve questions of federal law. 427 F.3d at 459. Jaskolski and the [NICB] may pursue on appeal in state court any argument they would have made in this court. If the Court of Appeals or the Supreme Court of Indiana concludes that the Attorney General abused his discretion, then the United States would be substituted as a defendant and the case would return to federal court. And if defendants' contentions are finally rejected by Indiana's judicial system, they may petition for a writ of certiorari under 28 U.S.C. § 1257(a).

Id. at 888.

Following the rejection of their appeal in *Daniels III,* Jaskolski and the NICB again sought certification of Jaskolski's purported status as a federal employee from the Lake Superior Court. On July 28, 2008, the trial court entered its order denying Jaskolski and the NICB's petition. The court stated, in relevant part, that Jaskolski and the NICB had "failed to present evidence sufficient enough to prove that the Attorney General abused his discretion in refusing to grant [Jaskolski] certification under the Westfall Act."

Appellants' App. at 43. This interlocutory appeal ensued.

DISCUSSION AND DECISION

Issue One: Propriety of Appeal

Overview

Although not identified as a specific issue in the briefing, the parties dispute this court's authority to determine whether Jaskolski is a federal employee. On this issue, the Danielses present a number of arguments against this court's power to hear Jaskolski and the NICB's (hereinafter collectively referred to as "Jaskolski," unless otherwise indicated) appeal. The Danielses' numerous arguments fall into the following three categories: (1) whether the U.S. Attorney General's certification decision is conclusive; (2) whether either the Westfall Act or 28 U.S.C. § 1447(d) prohibits state review of the certification decision; and (3) whether any of the prior federal decisions in this matter are entitled to preclusive effect over the question of Jaskolski's status as a federal employee. We address each of these three categories in turn.

Conclusiveness of Certification Decision

The parties first dispute the conclusiveness of the U.S. Attorney General's decision to grant or deny certification under the Westfall Act. In support of their position, the Danielses assert that:

> 28 U.S.C. § 2679(d)(2) states that the certification of the Attorney General "shall conclusively establish scope of office or employment for purposes of removal." There is no language in the statute that requires the Attorney General to "grant certification in all cases, but instead, apparently leaves that decision to his sound discretion."

Appellees' Brief at 14 (citations omitted).

The Danielses' argument ignores the United States Supreme Court decision in *Osborn*. In that case, the Court held that the "conclusively establish" language in 28 U.S.C. § 2679(d) applies *only* to the "for purposes of removal" language. *Osborn,* 549 U.S. at 241-42. That is, the U.S. Attorney General's certification of an employment status may confer jurisdiction on the federal courts (even if the certification decision is later overruled), but it does not end the inquiry into whether the United States should be substituted as a defendant. *See id.* at 240-45.

Further, concluding that the Attorney General's certification decision is conclusive as to the purported employee's status is in direct conflict both with the Westfall Act's plain language and other Supreme Court precedent. Again, 28 U.S.C. § 2679(d)(3) expressly provides for court review of the Attorney General's decision. And in *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 434 (1995), the Court held that "the Attorney General's certification that a federal employee was acting within the scope of his employment . . . does not conclusively establish as

correct the substitution of the United States as defendant in place of the employee." The Danielses' argument on this issue is without merit.

Whether the Certification Decision Can Be Raised in State Court

The Danielses next contend that "[t]he process of Certification that was established by the Westfall Act has come to its conclusion, and further re-visiting of the issue is neither intended by the [A]ct, nor provided for in the language of the Westfall Act." Appellees' Brief at 15, 20. Similarly, the Danielses maintain that 28 U.S.C. § 1447(d), which states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," prohibits state consideration of the rationale underlying the district court's remand order. We agree with Jaskolski that neither the Westfall Act nor § 1447(d) prohibits state review of the Attorney General's decision to deny certification under the Westfall Act.

In *Kircher v. Putnam Funds Trust,* 547 U.S. 633 (2006), the Supreme Court addressed the authority of the federal appellate courts under § 1447(d) to review a district court's remand order. The cause of action in *Kircher* was based on Illinois state law but invoked federal securities law. Under the federal laws at issue, a certain class of securities cases were

"precluded"[9] from state and federal review, but the statutes permitted those cases to be removed to the federal forum for a determination of their preclusive status. *Id.* at 636-37. The plaintiffs brought suit in an Illinois court on claims ostensibly precluded from review, the defendants removed to the federal district court, but the district court remanded the case to state court. The defendants appealed, the Seventh Circuit reversed the remand order, and, on certiorari, the Supreme Court reversed the Seventh Circuit.

In reaching its decision, the Court held that the state courts may reconsider the district court's rationale for remanding. Specifically, the Court stated as follows:

> The policy of Congress opposes "interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed," and nearly three years of jurisdictional advocacy in the cases before us confirm the congressional wisdom. For over a century now, statutes have accordingly limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court. The current incarnation is 28 U.S.C. § 1447(d). . . .
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> * * *

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[9] The use of the term "preclusion" in *Kircher* is statutory and is in no way related to the doctrine of res judicata. *Kircher*, 547 U.S. at 647 n.14.

> We have yet to deal with one objection to our application of § 1447(d), which if well taken would be a serious one. The Seventh Circuit's reading of subsection (c) [of the securities act at issue] so as to treat the application of the preclusion rule as non[-] jurisdictional was in part motivated by its assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. If that is so, and § 1447(d) applies, a remand order based on a finding that an action is not precluded would arguably be immune from review. This is what the funds in effect contend here when they say that a district court's finding of no subsection (b) preclusion would collaterally estop the state court on remand; the district court would have the last word. . . .
>
> But a district court does not have the last word on preclusion under the Act, for nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions.[10] A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body, *see Missouri Pacific*

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[10] Under the FTCA, "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States. . . ." 28 U.S.C. § 1346(b)(1). But that exclusive jurisdiction only arises once the United States is properly substituted as a defendant under the Westfall Act.

R. Co. v. Fitzgerald, 160 U.S. 556, 583, 16 S. Ct. 389, 40 L. Ed. 536 (1896)) to make the preclusion determination.

And what a state court could do in the first place it may also do on remand; in this case, the funds can presently argue the significance of [federal caselaw] and ask for dismissal on grounds of preclusion when they return to the state court. Collateral estoppel should be no bar to such a revisitation of the preclusion issue, given that § 1447(d) prevents the funds from appealing the District Court's decision. *See Standefer v. United States,* 447 U.S. 10, 23, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980) ("[C]ontemporary principles of collateral estoppel . . . strongly militat[e] against giving an [unreviewable judgment] preclusive effect" (citing Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 3, 1976)). . . . While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning, as we explained over a century ago in *Missouri Pacific Railway*: "[A]s to applications for removal on the ground that the cause arose under the Constitution, laws, or treaties of the United States," the finality accorded remand orders is appropriate because questions of this character "if decided against the claimant" in state court are "open to revision . . . , irrespective of the ruling of the [federal court] in that regard in the matter of removal." 160 U.S. [] at 583, 16 S. Ct. 389, 40 L. Ed. 536. Nor is there any

> reason to see things differently just because the remand's basis coincides entirely with the merits of the federal question; it is only the forum designation that is conclusive. Here, we have no reason to doubt that the state court will duly apply [federal caselaw], but any claim of error on that point can be considered on review by this Court. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 12, n[.]12, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) ("If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court" (citing *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982))).

Id. at 640, 645-48 (some alterations original; footnotes and some citations omitted).

Kircher is direct authority on the question of the power of Indiana's courts to review the U.S. Attorney General's decision not to certify a purported federal employee under the Westfall Act. Under the federal laws at issue in *Kircher,* the defendants could have *either* moved for dismissal of the action in state court *or* sought removal of the claim to federal court. *Id.* at 643-44. In recognition of that fact, the Court concluded that "what a state court could do in the first place it may also do on remand." *Id.* at 646. Likewise here, once the U.S. Attorney General has refused to certify the defendant's employment status, the Westfall Act specifically states that "*the employee may* at

any time before trial *petition the court* to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3) (emphases added). That same subsection later states that, when an action is pending in state court and the Attorney General has denied certification, "the action . . . may be removed . . . by the Attorney General to the district court" so that court may review the non-certification decision. *Id.* The prior provision generally refers to "the court" where the action is pending, and not necessarily to "the district court." And the latter provision states that the Attorney General's decision – not the employee's decision – to remove to "the district court" is discretionary.

Hence, in the event the U.S. Attorney General did not choose to have the local district court review his noncertification decision, that review would fall upon the state court if that was the forum in which the action was pending and the purported employee petitioned the court for review. Accordingly, the state court could review the Attorney General's action "in the first place," and therefore it may also do so on remand from the federal district court. *See Kircher,* 547 U.S. at 646. Stated another way, the Westfall Act provides, at the Attorney General's discretion, an additional level of review of the Attorney General's noncertification decision in a federal forum. But the Westfall Act does not grant exclusive jurisdiction of that question to the federal courts. And where there is not exclusive federal jurisdiction, *Kircher* reiterates the well-established principle that the state courts

are "perfectly free" to consider the substantive federal questions at issue. *See id.* at 646-47 (discussing *Mo. Pac. Ry.*, 160 U.S. at 583). On this issue, as with many others, the state and federal courts have concurrent jurisdiction.

In sum, the Westfall Act does not grant to the federal courts exclusive jurisdiction to review the U.S. Attorney General's decision not to certify a purported federal employee under the Act. And *Kircher* holds that, in such circumstances, § 1447(d) cannot limit state appellate jurisdiction. *Id.* at 646; *see also Foster v. Hill,* 497 F.3d 695, 698-99 (7th Cir. 2007); *Daniels III,* 484 F.3d at 888 (both opinions noting that the state courts were free to reconsider, on remand, the district court's rationale in its review of the U.S. Attorney General's decision not to certify a purported federal employee under the Westfall Act). Accordingly, neither the Westfall Act nor § 1447(d) prevents our review of Jaskolski's purported status as a federal employee.

Preclusive Effect of Prior Federal Decisions

Last, the Danielses assert that the question of Jaskolski's status under the Westfall Act has already been finally decided. That is, the Danielses argue that both the *Daniels II* and the *Daniels III* courts considered and answered the question and, as such, this court must defer to those decisions. Specifically, the Danielses contend that the district court's decision in *Daniels II* is the law of the case, and the

Seventh Circuit's opinion in *Daniels III* collaterally estops Jaskolski from raising his issue in this court. The Danielses misunderstand the doctrines of law of the case and collateral estoppel.

The district court's decision in *Daniels II* is not the law of the case. "[U]nder the discretionary law of the case doctrine, an appellate court's determination of a legal issue is binding in subsequent appeals given the same case and substantially the same facts." *Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048-49 (Ind. Ct. App. 2007). The *Daniels II* decision is not a prior decision from an appellate court. It is therefore not the law of the case.

Neither does the Seventh Circuit's decision in *Daniels III* preclude our review. In support of this position, the Danielses cite *McClanahan v. Remington Freight Lines,* 517 N.E.2d 390 (Ind. 1988). There, the Indiana Supreme Court noted that "collateral estoppel applies where a particular issue is adjudicated and then put in issue in a subsequent suit on a different cause of action between the same parties or their privies. Collateral estoppel is a derivative of res judicata." *Id.* at 394 (citation omitted). Here, however, there has never been a "subsequent suit on a different cause of action." *Id.* This matter began when the Danielses sued Jaskolski in state court. The U.S. Attorney General then removed the matter to federal court and, after two federal appeals, the matter was remanded to an Indiana court. Throughout that time, there has yet to be a final decision on the Danielses'

cause of action, let alone a "subsequent suit on a different cause of action." *See id.*

And *Daniels III* also is not the law of the case. Again, *Daniels III* was dismissed for lack of jurisdiction. *Daniels III,* 484 F.3d at 888. Hence, the substantive issue before this court – whether Jaskolski is an "employee of the government" under the Westfall Act – was in no way addressed in a prior appellate decision. Thus, Jaskolski's appeal is properly before this court at this time.

Issue Two: "Employee of the Government"

Standard of Review

Jaskolski asserts that he is an "employee of the government," as that term is used in the FTCA and the Westfall Act, for purposes of the Danielses' suit. In the federal appellate courts, the question of whether an individual is an employee of the U.S. government under the Westfall Act is a question of federal law and is reviewed de novo. *See Logue v. United States,* 412 U.S. 521, 528 (1973); *Sullivan v. United States,* 21 F.3d 198, 201 (7th Cir. 1994), *cert. denied,* 513 U.S. 1060 (1994); *Snodgrass v. United States,* 957 F.2d 482, 484 (7th Cir. 1992). While the Attorney General's decision is reviewed de novo, nonetheless the party challenging that decision bears the burden of persuading this court that the Attorney General's initial decision was incorrect. *See Palmer v. Flaggman,* 93 F.3d 196, 198-99 (5th Cir. 1996).

The Westfall Act defines an "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. The Westfall Act specifically excludes from that definition "any contractor with the United States." *Id.* The Supreme Court of the United States has long taken a narrow view in determining who is a federal employee and who is an independent contractor under § 2671: "the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor." *Logue,* 412 U.S. at 527-28 (discussing *Maryland v. United States,* 381 U.S. 41 (1965); Restatement (Second) of Agency § 2 (1958)); *see also United States v. Orleans,* 425 U.S. 807, 814-16 (1976).

The Supreme Court has "adopt[ed] a common-law test for determining who qualifies as an 'employee'" for statutes where Congress has not provided another definition. *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322-23 (1992). In *Logue,* the Supreme Court adopted the Restatement (Second) of Agency ("Restatement") to determine the relationship between the government and a purported employee under § 2671. *See Quilico v. Kaplan,* 749 F.2d 480, 483 (7th Cir. 1984) (discussing *Logue,* 412 U.S. at 527). Section 2 of the Restatement provides:

> (1) A master is a principal who employs an agent to perform service in his affairs and

> who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

The Seventh Circuit has referred to the common-law test adopted by the Supreme Court as the strict control test. "Under the 'strict control' test, an individual's status 'depends upon the amount of governmental agency control of physical performance of the [individual's] day-to-day activities.'" *Ezekiel v. Michel,* 66 F.3d 894, 901-02 (7th Cir. 1995) (quoting *Bailor v. Salvation Army,* 51 F.3d 678, 685 (7th Cir. 1995)) (alteration original); *see also Quilico,* 749 F.2d at 483-84. "An individual cannot be an 'employee of the government' under the FTCA absent governmental authority to supervise or control that person's daily activities." *Means v. United States,* 176 F.3d 1376, 1380 (11th Cir. 1999).

We also note that the facts of this case implicate the dual-servant doctrine and the borrowed-servant

doctrine because Jaskolski was employed by the NICB at the time he assisted the federal government in its prosecution of the Danielses. As such, either the NICB or the federal government might not be liable with respect to the scope of Jaskolski's activities. However, whether an employee is "acting within the scope of his office or employment" pursuant to the FTCA is a question of state, not federal, law.[11] *See* 28 U.S.C. § 1346(b)(1); *Williams v. United States,* 350 U.S. 857 (1955) (per curiam); *see, e.g., Green v. United States,* 709 F.2d 1158, 1162 n.3 (7th Cir. 1983) ("Whether or not the borrowed servant rule ought to be applied is a question that must be answered by reference to 'the law of the place where the act or omission occurred.'") (quoting 28 U.S.C. § 1346(b)). Here, Jaskolski and the NICB do not present argument with respect to the scope of his employment; rather, the only issue on appeal is whether Jaskolski was an employee of the federal government, and that question is a purely federal one. Thus, regardless of the shared nature of his activities, the test to be applied in determining Jaskolski's relationship with the federal government is the strict control test. *See Ezekiel,* 66 F.3d at 903 n.16 (noting that, even if the defendant could be considered a borrowed servant such that the federal government was only his

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[11] In Indiana, it is well established that, "[g]enerally, whether the tortious act of an employee is within the scope of employment is a question of fact." *Bushong v. Williamson,* 790 N.E.2d 467, 473 (Ind. 2003).

temporary employer, the test to determine whether he was an employee of the government was whether "the temporary employer exercises such control over the conduct of the employee as would make the employee his servant.")

Section 220(2) of the Restatement provides a nonexhaustive list of criteria for identifying a master-servant relationship:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

"While that section is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974). With those principles in mind, we turn to Jaskolski's arguments.

Application of the Strict Control Test

Jaskolski contends that he was an employee of the federal government for purposes of the Danielses' malicious prosecution action against him. On this issue, the *Daniels II* court concluded as follows:

> Although Jaskolski and the Government were clearly working together, there is no evidence in the record to show that the Government had the authority to control

Jaskolski's day-to-day activities. Jaskolski may have voluntarily done everything [FBI] Agent Campbell and AUSA Butler asked, but that does not mean that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will. In other words, evidence of the master/servant relationship described in *Logue* is missing in this case. *Logue* held that the "distinction between the servant or agent relationship and that of independent contractor turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract." *Logue,* 412 U.S. at 527. Here, there has been no evidence presented to this Court that either the FBI or the AUSA had the authority to control the physical conduct of Jaskolski.

Moreover, although certainly not dispositive, this Court has taken into consideration that Jaskolski was not paid by the Government, and the fact that Jaskolski continued to work on other cases assigned to him by the NICB (his salaried employer) during the relevant time period. Furthermore, the fact that Jaskolski brought this case to the attention of the FBI reflects Jaskolski's independence of action. Although Agent Campbell asked Jaskolski to assist in the investigation, this was not a situation where the FBI sought out Jaskolski's help, [or] employed Jaskolski for a period of time.

Daniels II, 2006 U.S. Dist. LEXIS 65896 at *19-*21 (some citations omitted). We agree with the district court's conclusion.

On appeal Jaskolski does not address the facts of his case with respect to the criteria listed in § 220(2) of the Restatement. Rather, in support of his contention that he acted as a federal employee during the prosecution of the Danielses, Jaskolski presents two sources of evidence.[12] First, Jaskolski references the Federal Rule of Criminal Procedure 6(e) certification form ("Rule 6(e) Form") that he signed with the federal government. That document states that the federal government would provide materials relating to a grand jury investigation to Jaskolski pursuant to Rule 6(e). Rule 6(e) states that such disclosures may be made by the government to "government personnel." Fed. R. Crim. P. 6(e)(3)(A)(ii). Hence, Jaskolski concludes that, if the government disclosed grand jury materials to him, he is "government personnel," and if he is government personnel, a fortiori he is an employee of the government. But Jaskolski reads too much into the Rule 6(e) Form.

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[12] Jaskolski also argues that the government admitted to his status as either government personnel or an employee in its district court filings. But the government did not concede Jaskolski's purported status in its filings to the district court. Rather, the government stated that "its actions in treating Jaskolski as 'government personnel' may not have been correct." Appellant's App. at 436-37.

As the Seventh Circuit recognized in *Daniels I*, the government's treatment of an individual as government personnel under Rule 6(e) is irrelevant to whether that person is in fact government personnel. *Daniels I*, 427 F.3d at 461. Rather, the purpose of Rule 6(e) is to protect the disclosure of investigatory information relating to the grand jury process. *See id.* Nothing in the rule amounts to the government's admission of an employment status.

Further, the phrase "government personnel" does not appear in the Rule 6(e) Form Jaskolski signed. *See* Appellant's App. at 430. Rather, the plain language of the form is merely to inform Jaskolski that grand jury investigations are secret and that an unauthorized disclosure of any material from such an investigation may subject Jaskolski to liability. *See id.* And Jaskolski signed the form from time-to-time in the course of his work with the NICB. The form most closely related in time to this appeal was signed in August of 1998, almost three months before Liberty Mutual informed the NICB of the Danielses' insurance claim, and was not specifically associated with this case. Thus, the Rule 6(e) Form is evidence only of Jaskolski's willingness to participate in some grand jury proceedings. It is not evidence of a contractual employment relationship with the government generally or as applied to the Danielses' case.[13]

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[13] Jaskolski's reference to 28 C.F.R. 0.138(a) sheds no light on this matter. That provision states simply that "[t]he Director

(Continued on following page)

Jaskolski's second, and final, source of evidence in favor of his position that he is a federal employee consists of various excerpts from his own affidavit and deposition. As the district court pointed out, those statements are summarized by the following paragraphs of Jaskolski's affidavit:

> 7. In general terms, I assisted only in the following areas:
>
> a. Accompanied Agent Campbell on interviews of witnesses;
>
> b. Accompanied Agent Campbell on site or other inspections;
>
> c. Assisted in reviewing documents as directed;
>
> d. Assisted in escorting of witnesses at grand jury proceedings;
>
> e. Assisted United States Attorney Clarence Butler at trial.
>
> 8. With regard to those activities, I did only what I was told to do by either Agent Campbell or AUSA Butler. . . .

Id. at 92; *see Daniels II,* 2006 U.S. Dist. LEXIS 65896 at *8-*9.

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of the [FBI] [and other similar officials] . . . are, as to their respective jurisdictions, authorized to exercise the power and authority vested in the Attorney General . . . to employ on a temporary basis experts or consultants. . . ." Again, Jaskolski presents no clear evidence that the FBI exercised that authority with respect to his participation in the investigation and prosecution of the Danielses.

Undoubtedly, Jaskolski participated in the federal investigation and prosecution of the Danielses. But the fact that the government allowed him to participate in those proceedings is not equivalent to saying that his participation was required by an explicit or implicit employment relationship. Nor is Jaskolski following the wishes of Agent Campbell or AUSA Butler equivalent to the federal government controlling his activities with respect to the federal investigation and prosecution of the Danielses. On such scant evidence of actual control by the federal government, Jaskolski's arguments would require this court to conclude that anyone who cooperates with a federal prosecutor is immune from liability as if he or she is a federal prosecutor. That simply cannot be an accurate assessment of the law. *See Slagle v. United States,* 612 F.2d 1157, 1160-61 (9th Cir. 1980) (holding that a federal drug informant acting under the partial direction of the FBI and for pay was not a federal employee under the FTCA).

There is no evidence that Jaskolski was pressed into service by the government. To the contrary, during the federal investigation and prosecution of the Danielses Jaskolski continued to be employed by the NICB and Jaskolski continued to work for the NICB. And the NICB's interests in the federal investigation and prosecution of the Danielses coincided perfectly with the interests of the federal government.

In the context of the ten factors of § 220(2) of the Restatement, we must conclude as follows. First, there is no evidence, other than Jaskolski's own

assertions, that the federal government exercised "control [over the] physical performance of the [individual's] day-to-day activities.'" *See Ezekiel,* 66 F.3d at 901-02; Restatement § 220(2)(a). And Jaskolski does not assert, nor is there evidence to suggest, that the FBI agent or AUSA considered Jaskolski to be a specialist in the area of insurance-fraud investigation or that the government deferred to his examination of witnesses and evidence. *See* Restatement § 220(2)(c), (d).

Additionally, other factors of § 220(2) indicate that Jaskolski was not an employee of the federal government. During his cooperation with the federal government, Jaskolski was engaged in a distinct occupation with the NICB. *See id.* § 220(2)(b). The federal prosecution of a purported criminal is "the kind of occupation" one would expect to occur "under the direction of the employer," which, again, Jaskolski has not demonstrated. *See id.* § 220(2)(c). And while the prosecution of federal criminals is undoubtedly "part of the regular business" of the federal government, again, there is no evidence to demonstrate that "the parties believe[d] they [were] creating the relation of master and servant." *See id.* § 220(2)(h), (i). To the contrary, the FBI never sought Jaskolski's help; rather, it was Jaskolski who, while working for the NICB, brought the Danielses' case to the FBI's attention. *See Daniels II,* 2006 U.S. Dist. LEXIS 65896 at *20-*21. The other factors listed in § 220(2) do not speak to the facts of Jaskolski's appeal.

Thus, considering the totality of the evidence and the factors, we must conclude that, while Jaskolski participated in the federal government's investigation and prosecution of the Danielses, he did so as a volunteer and an independent contractor and not as a federal employee. Jaskolski simply has not presented sufficient evidence to carry his burden of demonstrating that the Attorney General's initial decision under the Westfall Act was incorrect. *See Palmer,* 93 F.3d at 198-99. And Jaskolski was the party in the best position to establish his purported employment relationship – he could have sought the testimony of Agent Campbell or AUSA Butler, or he could have withheld his services from the federal government absent a clear employment agreement. We also note that, because Jaskolski is not entitled to immunity under the FTCA, his argument that the NICB should be dismissed from this action must also fail.

Finally, Jaskolski contends that we should hold that he is a federal employee because his case is factually analogous to at least five federal cases where an employment relationship was held to have existed. First, Jaskolski asserts that his case is factually analogous to *United States v. Becker,* 378 F.2d 319 (9th Cir. 1967), *overruled on other grounds by Felder v. United States,* 543 F.2d 657, 670 (9th Cir. 1976). There, the Ninth Circuit held that a pilot retained by the U.S. Forest Service for forest fire reconnaissance was an employee of the government under the FTCA. Specifically, the Ninth Circuit held:

McIlrath [the pilot] did not enter into his contract with the Forest Service pursuant to competitive bidding, but after elaborate testing procedures, was selected by Forest Service personnel on the basis of his availability, technical competence and the suitability of his aircraft. This contract required McIlrath to meet Forest Service requirements in all respects. It also specified the pilot's home base.

McIlrath was not paid a lump sum for achieving a particular result, but was paid at the rate of $30 an hour for himself and his airplane, when called upon to fly reconnaissance missions. He was required to maintain his qualifications as a pilot according to Forest Service standards, including submission to annual inspections and checks, and participation in training courses. McIlrath could not designate others to fly his aircraft on reconnaissance flights.

McIlrath operated under the detailed control and direction of the Forest Service, as manifested by Forest Service regulations which were binding upon him, and through specific directions given to him by the Fire Control Officer. These regulations and directions specifically included the matter of minimum altitude for reconnaissance flights. While McIlrath could, for safety reasons, refuse to fly when requested or, for the same reasons, make his own decisions as to altitude or other aspects of flight, he was otherwise subject to close supervision and control

> in flight. The Fire Control Officer was in charge of each flight and told the pilot "when and where to go and what to do." If the Forest Service did not like McIlrath's flying techniques or the way he maintained his airplane, it could terminate his services.

378 F.2d at 322-23 (footnotes omitted). *Becker* involved a number of factors not present here, i.e., a contract and federal control over the employee's activities, and, as such, is inapposite to Jaskolski's appeal.

Second, Jaskolski asserts that his case is factually analogous to *Martarano v. United States,* 231 F. Supp. 805 (D. Nev. 1964). There, the Nevada district court held that, although the employee "was hired by the State . . . , paid by the State, and received all fringe benefits of employment through state agencies," he was nonetheless a federal employee under the FTCA where the state and federal government had an agreement that "expressly assign[ed] 'direct supervision' of 'all operations' under the agreement to the Bureau of Sport Fisheries and Wildlife, a federal agency." 231 F. Supp. at 808. Again, there was no such agreement assigning "direct supervision" of Jaskolski's activities to the federal government here, and Jaskolski's reliance on *Martarano* is therefore misplaced.

Third, Jaskolski relies upon *Ezekiel,* 66 F.3d 894. In that case, the Seventh Circuit held that "the 'strict control test' is inappropriate to determine whether a resident physician in training is a federal employee or

an independent contractor for purposes of invoking the FTCA immunity." 66 F.3d at 902. Rather, many physicians' relationship to the government is "unambiguously governed" by other statutes. *Id.* at 903. In light of that law, the court held that the physician in that case was a federal employee. *Id.* at 903-04. But Jaskolski is not a physician, and thus the holding of *Ezekiel* is easily distinguished from this case.

Next, Jaskolski cites *Bird v. United States,* 949 F.2d 1079 (10th Cir. 1991). In *Bird,* the Tenth Circuit held that a nurse at a hospital on an Indian reservation was an employee of the government under the FTCA:

> Nurse Bullon was not a physician bound to exercise his judgment independently of a government supervisor. He was not only subject to the rules and regulations and, indeed, a statute placing him under the control and supervision of physician employees of the hospital, but he was under their actual control to the extent they chose to exercise it. He was required to work with patients designated by others. He maintained no separate office. He used hospital equipment exclusively. He could see patients in no other place nor under any other circumstance than as directed by government employees. He was under the control and supervision of the government surgeon at the hospital to the same extent that nurse Forsythe, a regular employee of the government, was.

949 F.2d at 1086. Once more, Jaskolski relies upon a factually inapposite case. We, therefore, do not find it persuasive.

Finally, Jaskolski cites *Linstead v. Chesapeake & Ohio Railway Co.*, 276 U.S. 28 (1928). In *Linstead*, one railway company loaned an employee to another. While rendering services to the second company, the employee was killed. The employee's estate sought compensation from the second company under the Federal Employers' Liability Act, which, like the FTCA, incorporated common-law definitions of master-servant relationships. The Court held that, at the time of his death, the employee was working for the second company. In so holding, the Court reasoned:

> we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

276 U.S. at 34. As discussed above, the federal government did not exercise control over Jaskolski's daily activities. Accordingly, Jaskolski's reliance on *Linstead* is to no avail.

CONCLUSION

In sum, we hold that this appeal is properly before this court at this time. And we hold that Jaskolski acted as an independent contractor, and not as an employee, when he volunteered and cooperated with the federal government in its investigation and prosecution of the Danielses. Thus, we affirm the trial court's judgment.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.

STATE OF INDIANA)		IN THE LAKE
	) SS:	SUPERIOR COURT
COUNTY OF LAKE)		CIVIL DIVISION
		ROOM ONE
		SITTING AT
		HAMMOND, INDIANA

RICK DANIELS and ANNA DANIELS,	)	
Plaintiffs	)	
	)	Cause No.
vs.	)	45D01 0112 CT 193
LIBERTY MUTUAL INSURANCE CO., JOSEPH JASKOLSKI, NATIONAL INSURANCE CRIME BUREAU, TOMAS KEER, VEHICLE INVESTIGATIONS NATIONWIDE, INC., MICHEAL [sic] A. EVANS, Individually and d/b/a AIT LABORATORIES,	)	
Defendants,	)	

ORDER OF JULY 28, 2008

The Court, having taken under advisement Defendant's Motion for Ruling on their Petition for Certification Under the Westfall Act, now finds as follows:

1. The pertinent section of the Westfall Act states:

> In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

28 U.S.C. § 2679(d)(3).

2. The Court finds that Attorney General through his designee, the United States Attorney, did not certify Defendant under the Westfall act. *Daniels*

v. Liberty Mut. Ins. Co., No. 2:06-CV-213, 2006 WL 2644949 (N.D. Ind. Sept. 14, 2006).

3. The Court finds that the district court did not grant Defendant certification under the Westfall Act due to the fact that the Federal government lacked the authority to control Defendant's actions. *Daniels v. Liberty Mut. Ins. Co.*, No. 2:06-CV-213, 2006 WL 2644949 (N.D. Ind. Sept. 14, 2006).

4. Defendant contends that the Attorney General abused his discretion when he did not grant him certification under the Westfall Act.

5. The Court finds that Defendant has failed to present evidence sufficient enough to prove that the Attorney General abused his discretion in refusing to grant him certification under the Westfall Act.

6. The Court now ORDERS that Defendants request for certification under the Westfall Act herein be and is hereby DENIED.

SO ORDERED this 28th day of July 2008.

/s/ Diane Kavadias Schneider
Diane Kavadias Schneider,
Judge

Date: July 28, 2008

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

RICK DANIELS and ANNA DANIELS,	)	
Plaintiffs,	)	
vs.	)	
LIBERTY MUTUAL INSURANCE COMPANY, JOSEPH JASKOLSKI, individually, NATIONAL INSURANCE CRIME BUREAU, THOMAS KERR, individually, VEHICLE INVESTIGATIONS NATIONWIDE INC., MICHAEL A. EVANS, individually and d/b/a AIT LABORATORIES,	)	NO. 2:06-CV-213
Defendants.	)	
**********	)	
JOSEPH JASKOLSKI, individually, and the NATIONAL INSURANCE CRIME BUREAU,	)	
Defendants/Petitioners,	)	
vs.	)	
ALBERTO R. GONZALES, Attorney General of the United States of America, JOSEPH S. VAN BOKKELEN, United States Attorney for the Northern District of Indiana, and THE UNITED STATES OF AMERICA,	)	
Respondents.	)	

OPINION AND ORDER

This matter is before the Court on (1) Jospeh [sic] Jaskolski and National Insurance Crime Bureau's Petition for Certification of Scope of Employment Pursuant to 28 U.S.C. section 2679(d)(3), filed by Joseph Jaskolski and the National Insurance Crime Bureau on June 19, 2006; and (2) the United States' Motion for Remand under 28 U.S.C. section 2679, filed by the United States on June 29, 2006. For the reasons set forth below, the Petition for Certification is **DENIED** and the motion for remand is **GRANTED.** The Clerk is **ORDERED** to **REMAND** this cause to the Superior Court of Lake County, Indiana.

BACKGROUND

Jaskolski is an investigator with the National Insurance Crime Bureau ("NICB"). In this action, Jaskolski and the NICB have filed a petition seeking an order declaring that Jaskolski was an "employee of the government" under 28 U.S.C. section 2671 during a grand jury investigation and criminal prosecution of Plaintiff, Rick Daniels. The Federal Employee Litigation Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (the "Westfall Act"), provides a procedural mechanism to ask the Attorney General to determine the scope of employment and then petition this Court to review the Attorney General's decision. Jurisdiction is therefore present under 28 U.S.C. section 2679(d)(3).

The NICB is a not-for-profit organization funded by insurance companies to investigate and detect instances of insurance fraud. During the course of his salaried employment with the NICB, Jaskolski worked with the FBI and the United States Attorney's Office on the investigation of Rick Daniels and Kenneth Daniels stemming from an insurance claim that arose from an October 23, 1998 motorhome fire. As a result, Rick and Kenneth Daniels faced a multi-count criminal prosecution in the case captioned *United States of America v. Daniels, et al.*, case number 2:00-CR-202, in this Court.

A jury trial was held, and the Daniels were acquitted of their criminal charges. Thereafter, Rick Daniels and his wife Anna Daniels filed two state court actions which were consolidated into this 15-count lawsuit in Lake County Superior Court (Cause No. 45D01 0112 CT 193), alleging that NICB, Jaskolski, and other parties maliciously prosecuted the Daniels by intentionally causing the federal criminal prosecution to be instituted against them. Jaskolski and the NICB notified the United States Attorney of the suit under 28 U.S.C. section 2679(c), and asked the United States Attorney to certify that Jaskolski was acting as an "employee of the government" as defined in 28 U.S.C. section 2671. The United States Attorney sent the request to the Department of Justice in Washington, D.C., the Associate Attorney General considered the request, and declined to issue the section 2679 certification. This case was removed to this Court so the petition

for determination of the scope of employment of Jaskolski could be decided by this Court.

During Jaskolski's investigation and participation in the prosecution of the Daniels, Jaskolski was a salaried employee of the NICB. The NICB received a request from Liberty Mutual Insurance Company to investigate an insurance claim that had been made by Liberty Mutual's insureds, the Daniels. Jaskolski opened a case file, gathered information for three or four weeks, then contacted the Federal Bureau of Investigation ("FBI"). On April 1, 1999, Jaskolski met with Special Agent Timothy Campbell to discuss the Daniels' insurance claim. At that meeting, Agent Campbell decided to request that the United States Attorney's office open a criminal investigation into the claim, and he also asked Jaskolski to assist in the investigation. Jaskolski described the relationship as a joint investigation with the FBI. Jaskolski was never paid by the FBI.

Jaskolski contends he was acting under the supervision of the FBI because he executed a certification pursuant to Federal Rule of Criminal Procedure Rule 6(e). In a related case, *Jaskolski v. Daniels, et. al.*, 2:03-cv-479, pending in this Court, an issue arose regarding whether Jaskolski was required to disclose grand jury materials pursuant to Federal Rule of Criminal Procedure 6. During his investigation, Jaskolski had access to grand jury information and the United States Attorney's Office treated Jaskolski as if he fell within the provision of Rule 6(e)(3)(A)(ii) that permits disclosure of grand

jury matters to government personnel, and filed a notice of disclosure with the Court pursuant to Rule 6(e)(3)(b). During the course of discovery in the state court action, the Daniels sought disclosure of materials that Jaskolski claimed were grand jury materials, and Jaskolski argued that the Daniels had to follow the procedures of Rule 6 to obtain disclosure of the materials. Instead, the Daniels filed two motions to compel in the state court proceeding, and the motions were granted. In response, Jaskolski and the NICB filed the federal case, cause number 2:03-cv-479, requesting a preliminary injunction.

In an order dated August 31, 2004, this Court granted the motion for preliminary injunction. The issue for that motion was whether Jaskolski was "government personnel" in the criminal prosecution-for, if he was, then he "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). In ruling on the motion for preliminary injunction, this court specifically declined to consider the definition of "employee of the government" of the FTCA in considering if Jaskolski was "government personnel" under Rule 6, because Jaskolski and the NICB provided no persuasive justification for using the FTCA's definition. *See Jaskolski v. Daniels*, 2:03-CV-479, slip op., at 6 n. 2. This Court reasoned that it was more likely than not that Jaskolski did not fit within the definition of "government personnel" under Rule 6, but concluded "that any grand jury information disclosed to Jaskolski should not be freely divulged merely because the Government may

have erred, in good faith, by treating Jaskolski as 'government personnel.'" (*Id.* at 11-12.) The Seventh Circuit affirmed this decision in *Jaskolski v. Daniels,* 427 F.3d 456 (7th Cir. 2005), noting that although the parties wanted the Court "to determine the proper classification of private insurance investigators under Rule 6(e)(3)(A)(ii)," the Court declined to decide whether Jaskolski acted as "government personnel" finding:

> Disclosure was made to Jaskolski under Rule 6(e)(3)(A)(ii). Whether the disclosure was made "properly" or "correctly" is neither here nor there. Rule 6(e)(2)(B) asks whether disclosure has been "made under" a particular subsection, not whether the subsection was applied correctly. This protects the prosecutor's (and the witnesses') reliance interests and prevents a blunder from opening the investigatory files.

Id. at 459, 461. Thus, neither this Court nor the Seventh Circuit directly ruled upon whether Jaskolski was "government personnel" for the purposes of Rule 6 (much less have the Courts ruled upon whether Jaskolski was an "employee of the government" under the FTCA).

Returning to the investigation at issue, Special Agent Timothy Campbell of the FBI asked Jaskolski to assist in the investigation. (Jaskolski Aff. ¶ 4.) According to Jaskolski, it was clear to him that any assistance he provided would be subject to the terms of the Rule 6(c) certification he had previously signed.

(*Id.* ¶ 6.) Jaskolski attests in his affidavit that generally, he assisted in the following areas:

a. Accompanied Agent Campbell on interviews of witnesses;

b. Accompanied Agent Campbell on site or other inspections;

c. Assisted in reviewing documents as directed;

d. Assisted in escorting of witnesses at grand jury proceedings;

e. Assisted United States Attorney Clarence Butler at trial.

(*Id.* ¶ 7.) With regard to those activities, Jaskolski claims he "did only what [he] was told to do by either Agent Campbell or AUSA Butler, or other FBI agents and U.S. Attorneys." (*Id.* ¶ 8.) Additionally, Jaskolski claims he acted "under the direct supervision or control of either Agent Campbell or Agent Butler" and that they "always decided what particular result to achieve and they alone decided also to achieve that result in a particular way at a particular location at a particular time with particular documents or persons." (*Id.* ¶ 9.) Jaskolski "did not and could not exercise any independent judgment of [his] own with regard to any aspect of the investigation, indictment or prosecution of the Daniels." (*Id.* ¶ 10.) He interviewed only those witnesses directed by Agent Campbell or AUSA Butler, and one of them was always physically present and directly supervising or directing Jaskolski. (*Id.* ¶ 11.) Similarly, Agent

Campbell or AUSA Butler decided what documents to subpoena or obtain, as well as the inspections to conduct. (*Id.* ¶ 12.)

At trial, Jaskolski assisted Agent Campbell or AUSA Butler according to their directions (such as requests for documents or other information). (*Id.* ¶ 14.) At the trial, Jaskolski sat at counsel table, but was introduced as a representative of the NICB. (Jaskolski Dep., p. 254.) Jaskolski considered himself a part of the prosecution team. (Jaskolski Dep., p. 161.) Jaskolski did not report to anyone at the NICB any information regarding the Daniels investigation or prosecution, and no one at the NICB influenced his investigation and prosecution of the Daniels. (Jaskolski Aff., ¶ 16.) While Jaskolski worked on the Daniels case, he also worked on other cases assigned to him by his supervisor at the NICB. (Jaskolski Dep., pp. 204-05.)

DISCUSSION

The United States may not be sued without the express consent of Congress. *United States v. Mitchell,* 445 U.S. 535, 539 (1980). The Federal Tort Claims Act ("FTCA") is a limited waiver of the sovereign immunity of the United States. *Warrum v. United States,* 427 F.3d 1048, 1049-50 (7th Cir. 2005). As a waiver of sovereign immunity, "the FTCA must be strictly interpreted." *Quilico v. Kaplan,* 749 F.2d 480, 483 (7th Cir. 1984).

The Westfall Act amended portions of the FTCA to extend immunity from liability to federal employees sued for tortious conduct occurring within the scope of their employment. *See Taboas v. Mlynczak,* 149 F.3d 576, 579 n. 1 (7th Cir. 1998). When a defendant files a tort action against a federal employee, the Attorney General may certify that the employee acted within the scope of his office or employment with respect to the actions giving rise to the suit, thereby effectuating a substitution of the United States of America as the lone defendant. *Id.*, 28 U.S.C. § 2679(d)(1). In this case, Jaskolski and the NICB requested certification from the United States Attorney for the Northen [sic] District of Indiana, asking the United States Attorney to certify that Jaskolski was acting as an "employee of the government" as defined in 28 U.S.C. section 2671. The request was forwarded to the United States Department of Justice in Washington, D.C., and certification was denied.

Under 28 U.S.C. section 2679, if the Attorney General or his designee refuses to certify that a defendant was a federal employee acting within the scope of employment, the aggrieved person can petition this Court to make such a certification:

> In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or

> employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. . . . In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

28 U.S.C. § 2679(d)(3). If Jaskolski and the NICB's petition for certification is denied, this case will be remanded to state court.

Initially, the Court notes that the parties dispute the applicable burden of proof. Our review is de novo to determine if certification was properly denied. *Hamrick v. Franklin,* 931 F.2d 1209, 1211 (7th Cir. 1991). Additionally, because the parties dispute whether Jaskolski was an employee of the Government (not whether he exceeded the scope of his employment), "[t]his is purely a question of statutory interpretation on which neither party bears the burden of proof." *Sullivan v. United States,* 21 F.3d

198, 201 n. 6 (7th Cir. 1994). The United States argues that a plaintiff challenging the decision of the Attorney General to deny certification has the burden of coming forward with specific facts rebutting the decision. This is not true in this case. Upon certification, the plaintiff bears the "burden of showing that the [defendant's] conduct was not within the scope of employment." *Hamrick*, 931 F.2d at 1211. However, this burden is inapplicable to the question of whether an individual defendant is a federal employee. *See Ezekiel v. Michel*, 66 F.3d 894, 899-900 (7th Cir. 1995). The language of the FTCA's certification provision assumes that the defendant is a federal employee, therefore, the certification is only relevant to whether the named defendant was acting within the scope of his federal employment, not whether the defendant was a federal employee. *Id.* In this case, the United States does not contend that Jaskolski exceeded the scope of his employment, rather, it argues that he is not a federal employee at all.

The FTCA permits the United States to be sued for the negligence of its "employees" acting in the scope of their employment under circumstances where the United States would be liable under applicable state law if it were a private person. 28 U.S.C. § 1346. The FTCA defines "employee of the government" as follows:

> "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National

> Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and **persons acting on behalf of a federal agency in an official capacity,** temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671 (emphasis added). Whether an individual is an employee of the United States for purposes of the FTCA is determined by federal law. *See Logue v. United States*, 412 U.S. 521, 528 (1973); *Ezekiel*, 66 F.3d at 899. Additionally, individuals and organizations that are independent contractors are specifically not included under the FTCA.[1] There is no contention that Jaskolski was an officer or employee of a federal agency, or an active member of the military forces. The parties dispute whether Jaskolski was a person "acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States." 28 U.S.C. § 2671.

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[1] Section 2671 reads:

> [T]he term "Federal Agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

28 U.S.C. § 2671.

Jaskolski and the NICB's strongest argument is that the Government treated Jaskolski as Government personnel (as found by the Seventh Circuit), and, in the previous dispute over grand jury materials disclosure, the Government actually argued that Jaskolski was Government personnel under Rule 6. However, Rule 6's "government personnel" is not identical to the FTCA's "employee of the government." Moreover, as noted earlier, neither this Court nor the Seventh Circuit decided whether Jaskolski was Government personnel under Rule 6.

In addressing the merits of this case, the Court must start at the test set forth by the Supreme Court in *Logue v. United States*, 412 U.S. 521, 527-28 (1973). There, the Court held that a person is not an "employee of the Government" unless the Government has the authority to supervise the day-to-day activities of that individual. In *Logue*, the Government was found not liable for the negligence of county jail employees resulting in the suicide of a prisoner. Even though the county jail had a contract with the Federal Bureau of Prisons and was subject to federal regulations, the Court found the county jail was an independent contractor (not a federal employee), because the Federal Bureau of Prisons did not supervise the physical performance of its duties. *Id.* at 529-30. The same rationale led the Court to hold that the county jail employees were not "acting on behalf of the Government." *Id.* In making this determination, the *Logue* court noted that "modern common law as reflected in the Restatement of Agency . . . make the

distinction between the servant or agent relationship and that of independent contractor turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract," and referred to the basic definition of "master" and "servant" from the Restatement of Agency, section 2 (1958):

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

Logue, 412 U.S. at 527 (citing Restatement of Agency, § 2 (1958)).

Citing *Logue,* the Seventh Circuit has found that "before the defendants may be considered government employees, it must be demonstrated that the government is authorized to direct or control the detailed performance of the defendants' work." *Quilico,* 749 F.2d at 482. Notably, it is not necessary that the Government continually control all aspects of the individual's activities, so long as it has the authority to do so given the nature of the task. *See Means v. United States,* 176 F.3d 1376, 1380 (11th Cir. 1999). Yet, "[a]n individual cannot be an 'employee of the government' under the FTCA absent governmental

authority to supervise or control that person's daily activities." *Id.*

So, whether Jaskolski can be considered a Government employee under the FTCA boils down to whether the Government was authorized to direct or control the day to day performance of Jaskolski's work. The Government argues that the statements in Jaskolski's affidavit (contending that he worked at the control and direction of the FBI and the AUSA), are self-serving and irrelevant, citing *Wright v. United States,* 537 F. Supp. 568, 570 (N.D. Ill. 1982). In *Wright,* the Court found that "[t]he self-serving characterizations of the parties are irrelevant" to the basic control test. *Id.* The assertions here are at least a little more than just characterizations by the parties. Jaskolski did attest to the accuracy of his affidavit. Nevertheless, the NICB and Jaskolski concede that Jaskolski's affidavit may be "self-serving," however, such criticism is not a proper evidentiary objection. (Petitioners Jospeh [sic] Jaskolski's and NICB's Combined Reply in Supp. of Their Westfall Pet. and Resp. to Respondents' Mots. for Remand, p. 15 n. 4.) Affidavits can always be characterized as self-serving to some degree, and this Court has given Jaskolski's affidavit due consideration.

In applying the control test to this set of facts, the Court finds that the facts establish that the Government did not have the authority to control and direct Jaskolski's actions in the investigation and prosecution. Although Jaskolski and the Government were clearly working together, there is no evidence in

the record to show that the Government had the authority to control Jaskolski's day-to-day activities. Jaskolski may have voluntarily done everything Agent Campbell and AUSA Butler asked, but that does not mean that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will. In other words, evidence of the master/servant relationship described in *Logue* is missing in this case. *Logue* held that the "distinction between the servant or agent relationship and that of independent contractor turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract." *Logue*, 412 U.S. at 527. Here, there has been no evidence presented to this Court that either the FBI or the AUSA had the **authority** to control the physical conduct of Jaskolski. *See Thompson v. Dilger*, 696 F. Supp. 1071, 1075 (E.D. Va. 1988) ("Absent governmental authority to supervise or control a person's daily activities, that person cannot be an 'employee of the Government' under the FTCA.").

Moreover, although certainly not dispositive, this Court has taken into consideration that Jaskolski was not paid by the Government, and the fact that Jaskolski continued to work on other cases assigned to him by the NICB (his salaried employer) during the relevant time period. Furthermore, the fact that Jaskolski brought this case to the attention of the FBI reflects Jaskolski's independence of action. Although Agent Campbell asked Jaskolski to assist in the investigation, this was not a situation where the

FBI sought out Jaskolski's help, and employed Jaskolski for a period of time.

Based upon all of these considerations, the Court finds the Government lacked the authority to control the detailed performance of Jaskolski and the NICB. As such, Jaskolski is not an "employee of the government" under the FTCA, and remand is appropriate.

CONCLUSION

For the reasons set forth below, the Petition for Certification is **DENIED** and the motion for remand is **GRANTED.** The Clerk is **ORDERED** to **REMAND** this cause to the Superior Court of Lake County, Indiana.

DATED: September 14, 2006

/s/ RUDY LOZANO, Judge
United States District Court

In the
United States Court of Appeals
for the Seventh Circuit

No. 06-3508

RICK DANIELS and ANNA DANIELS,

Plaintiffs-Appellees,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,

Defendants,

and

JOSEPH JASKOLSKI and NATIONAL INSURANCE CRIME BUREAU,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:06-CV-213 – Rudy Lozano, *Judge*.

ARGUED APRIL 12, 2007 – DECIDED APRIL 20, 2007

Before EASTERBROOK, *Chief Judge*, and RIPPLE and SYKES, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. This is another episode in long-running litigation commenced by Rick and Anna Daniels, who were acquitted of insurance fraud and now seek damages from persons who

proposed or assisted the prosecution. The Danielses filed their suit in state court, and two of the defendants – Joseph Jaskolski and National Insurance Crime Bureau – would prefer to be in federal court. But the claim arises under state law, and the requirements of the diversity jurisdiction are not satisfied.

That has not deterred Jaskolski and the Bureau from trying to have issues, if not the whole suit, resolved in federal court. In 2003 they asked the federal court to assume management of discovery, on the ground that plaintiffs were probing too deeply into materials that had been submitted to a federal grand jury. We rejected most of their arguments and concluded that the litigation should be returned to the state court's control after a few issues had been clarified. *Jaskolski v. Daniels,* 427 F.3d 456 (7th Cir. 2005).

That defeat led Jaskolski and the Bureau to demand that the Attorney General certify that they had acted as federal employees, and within the scope of that employment, to the extent they assisted the United States Attorney. Such a certification would require the court to dismiss them as defendants and to substitute the United States in their stead; the litigation then would proceed under the Federal Tort Claims Act. See 28 U.S.C. §2679(d) (part of the FTCA known as the Westfall Act). The Attorney General concluded that the standards for substitution had not been met – but he removed the proceeding to federal court, as 28 U.S.C. §2679(d)(3) permits, so that a

federal judge could decide whether this decision is sound. Section 2679(d)(3) provides:

> In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

The district court concluded that the Attorney General's decision is correct – that Jaskolski was not acting as a federal employee, making it irrelevant

whether his acts were within the scope of that non-existent employment. 2006 U.S. Dist. LEXIS 65896 (N.D. Ind. Sept. 14, 2006). As for the Bureau: a corporation could not be a federal "employee" on any understanding. The judge then remanded the proceeding to state court, as the last sentence of §2679(d)(3) requires.

Jaskolski and the Bureau appealed, and the Danielses have moved to dismiss that appeal under 28 U.S.C. §1447(d), which provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise". We deferred action while *Osborn v. Haley*, 127 S. Ct. 881 (2007), was under advisement, then received supplemental briefs concerning the effect of the Supreme Court's decision. Having considered these submissions, we conclude that §1447(d) as understood in *Osborn* makes the remand order unreviewable.

Osborn started out in state court. Plaintiffs acknowledged that Haley, the defendant, was a federal employee. The Attorney General removed the suit and certified that Haley had acted within the scope of his federal employment, which automatically substituted the United States as the defendant. The plaintiff asked for review, and the district court held that the Attorney General had erred – that Haley should remain the defendant in his personal capacity – and remanded the case to state court. That remand was flagrantly erroneous, for the final sentence of §2679(d)(2) says that "certification [by] the Attorney General shall conclusively establish scope of office or

employment *for purposes of removal*" (emphasis added). Once the Attorney General makes a scope-of-federal-employment certification, the suit must be resolved on the merits in federal court even if the certification is mistaken.

Haley appealed, and the Supreme Court had to decide whether §1447(d) blocked review. Six Justices concluded that §2679(d)(2) must be treated as an exception to §1447(d) to prevent district judges from nullifying an Act of Congress. The Court discussed at some length "[t]he [Westfall] Act's distinction between removed cases in which the Attorney General issues a scope-of-employment certification and those in which he does not" (127 S. Ct. at 894). In the former situation, §2679(d)(2) supersedes §1447(d) because the district court has no authority to remand, no matter what the judge thinks about the propriety of the certification. In the latter, remand follows from the decision that the person seeking certification is not entitled to it. The district judge's authority to review the Attorney General's non-certification decision under §2679(d)(3) includes authority (indeed, an obligation) to remand. The Court wrapped up: "Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way – from state to federal court – does today's decision [limiting the scope of §1447(d)] hold sway." 127 S. Ct. at 896.

When the Attorney General declines to make a scope-of-federal-employment certification, the case properly may move in both directions: to federal court for review of the decision, then back to state court if

the district judge finds that the Attorney General acted within his discretion. The "extraordinary case" of a statute forbidding remand does not obtain.

Jaskolski contends that the distinction between the two situations is unconstitutional, but that argument is a non-starter. Congress had a rational basis for providing that litigation be resolved in federal court once the Attorney General concludes (correctly or not) that the defendant acted within the scope of federal employment. In the absence of such a decision, however, the case presumptively belongs in state court, and appellate review may be limited in order to prevent just what has happened here: prolonged litigation about where litigation will occur, to the detriment of speedy decision on the merits.

Nonetheless, the Attorney General insists, we must review the district court's finding about "employee" status even if we cannot review the remand order. This line of argument relies on *Osborn*'s holding that a district court's resolution of a dispute about certification is a collateral order, "final" under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Osborn*, 127 S. Ct. at 892-93.

Although finality is a necessary condition of appellate review (for no statute authorizes review of interlocutory decisions in this situation), finality is not a sufficient condition for appellate review. That's why, immediately after deciding that the decision was "final", the Court asked in *Osborn* whether §1447(d)

blocked review of the order. If it does, then the appeal must be dismissed. An appellate tribunal cannot review the statements in a district judge's opinion; that would be an advisory opinion. Only the district court's "final decision" is open to review. And that "decision" is the order remanding the suit to state court. When §1447(d) applies, the court must dismiss the appeal without discussing whether the district court made a mistake. See *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006). See also *In re Mutual Fund Market-Timing Litigation*, 468 F.3d 439 (7th Cir. 2006) (the decision on remand from *Kircher*). Neither Jaskolski nor the Attorney General has brought to our attention any decision in the history of the Supreme Court holding that an appellate tribunal may (let alone must) render an opinion about the merits of some dispute when it lacks authority to alter the decision supposedly being reviewed.

It is logically possible for Jaskolski to be a federal "employee" but not to have acted within the scope of his employment. That the remand could be right even if the district judge was wrong about the "employee" issue does not, as the Attorney General supposes, entitle us to opine on the subject notwithstanding §1447(d). It just reinforces the point that anything we could say would be advisory, because it would not affect the district court's order. The Attorney General does not think Jaskolski a federal employee, and even if we were to take Jaskolski's side of that dispute §1447(d) would prevent us from changing the judgment. Discussion would be so much hot air.

Waco v. United States Fidelity & Guaranty Co., 293 U.S. 140 (1934), on which Jaskolski and the Bureau rely for the proposition that an appellate court may address the substantive issues even if the remand is unreviewable, does not support that proposition. The holding of *Waco* is that, when one case presents two distinct claims for relief, and the district court finally resolves one while remanding the other, the claim that was *not* remanded may be appealed within the federal system. Jaskolski and the Bureau do not propose to appeal a separate claim for relief; they seek review of an issue that arises in (and potentially matters to) a claim that arises under state law and has been remanded to state court. *Waco* is irrelevant.

According to Jaskolski and the Bureau, failure to supply appellate review of the Attorney General's non-certification decision would violate the due process clause of the fifth amendment. Yet the Supreme Court has never held that there is a constitutional right to appellate review in civil litigation. Not that §1447(d) deprives anyone of an opportunity for further review. It simply allocates litigation between state and federal tribunals and curtails the delay that (effectively) interlocutory appellate review can create. The decision is "final" under *Cohen* but the posture is nonetheless interlocutory: remand means that the suit is ongoing. As we reminded Jaskolski the last time, state courts are competent to resolve questions of federal law. 427 F.3d at 459. Jaskolski and the Bureau may pursue on appeal in state court any argument they would have

made in this court. If the Court of Appeals or the Supreme Court of Indiana concludes that the Attorney General abused his discretion, then the United States would be substituted as a defendant and the case would return to federal court. And if defendants' contentions are finally rejected by Indiana's judicial system, they may petition for a writ of certiorari under 28 U.S.C. §1257(a).

The appeal is dismissed for want of jurisdiction.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 20, 2007

BEFORE: Honorable FRANK H. EASTERBROOK,
Chief Judge

Honorable KENNETH F. RIPPLE,
Circuit Judge

Honorable DIANE S. SYKES,
Circuit Judge

No. 06-3508

RICK DANIELS and ANNA DANIELS,

Plaintiffs-Appellees

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,

Defendants

and

JOSEPH JASKOLSKI and
NATIONAL INSURANCE CRIME BUREAU,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. 06 C 213, Rudy Lozano, Judge

This appeal is DISMISSED, with costs, for want of jurisdiction. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

CLERK
SUPREME COURT,
COURT OF APPEALS, AND TAX COURT
STATE OF INDIANA
217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365

[Seal Omitted]
Kevin S. Smith
Clerk

JAMES BRANIT
303 WEST MADISON
STREET
SUITE 300
CHICAGO, IL 60606

Cause Number

45A04-0810-CV-00588
Lower Court Number:
45D010112CT193

JASKOLSKI, JOSEPH ET AL -V-
DANIELS, RICK ET AL

You are hereby notified that the COURT OF APPEALS has on this day 7/24/09

APPELLANT'S PETITION FOR REHEARING DENIED.

FOR THE COURT, JOHN G. BAKER,
CHIEF JUDGE

ALL PANEL JUDGES CONCUR. KM

WITNESS my name and
the seal of said Court, this
24TH day of JULY, 2009

/s/ Kevin S. Smith
Clerk, Supreme Court,
Court of Appeals
and Tax Court

CLERK
SUPREME COURT,
COURT OF APPEALS, AND TAX COURT
STATE OF INDIANA
217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365

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Cause Number

45A04-0810-CV-00588
Lower Court Number:
45D010112CT193

JASKOLSKI, JOSEPH ET AL -V-
DANIELS, RICK ET AL

You are hereby notified that the SUPREME COURT has on this day 11/12/09

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE

REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR. KJ

WITNESS my name
and the seal of said
Court, this 12TH day
of NOVEMBER, 2009

/s/ Kevin S. Smith

STATE OF INDIANA	)	**IN THE LAKE SUPERIOR COURT**
	) SS.	**ROOM NUMBER FIVE**
COUNTY OF LAKE	)	**SITTING IN HAMMOND, INDIANA**

RICK DANIELS and ANNA DANIELS,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, JOSEPH JASKOLSKI, Individually, NATIONAL INSURANCE CRIME BUREAU, THOMAS KERR, Individually, VEHICLE INVESTIGATIONS NATIONWIDE, INC., MICHAEL A. EVANS, Individually and d/b/a AIT LABORATORIES,

Defendants.

CAUSE NO.: 45D01 0112 CT 193

(Filed June 19, 2006)

JOSEPH JASKOLSKI, Individually, and the NATIONAL INSURANCE CRIME BUREAU,

Petitioners,

vs.

ALBERTO R. GONZALES, Attorney General of the United States of America, JOSEPH S. VAN BOKKELEN, United States Attorney for the Northern District of Indiana, and THE UNITED STATES OF AMERICA,

Respondents.

JOSEPH JASKOLSKI AND NATIONAL INSURANCE CRIME BUREAU'S PETITION FOR CERTIFICATION OF SCOPE OF EMPLOYMENT PURSUANT TO 28 U.S.C. § 2679(d)(3)

COME NOW Defendants JOSEPH JASKOLSKI and NATIONAL INSURANCE CRIME BUREAU, by and through their attorneys John J. Bullaro, Jr. and Cornelius J. Harrington, III of the law offices of Bullaro & Carton, P.C., and hereby brings this petition pursuant to 28 U.S.C. § 2679(d)(3) for entry of an order certifying that all of Joseph Jaskolski and National Insurance Crime Bureau's actions were in the scope of their federal employment and for an order substituting the United States as a defendant in their place. In support of this Petition, these Defendants state:

A. This Litigation.

1. On November 17, 2000, a Federal Grand Jury sitting in Hammond, Indiana returned an

Indictment against Kenneth Daniels and plaintiff Rick Daniels. A true and accurate copy of the Indictment is attached as Exhibit A.

2. On April 2001, a second Federal Grand Jury issued a Superceding Indictment against Rick and Kenneth Daniels. A true and accurate copy of the Superceding Indictment is attached as Exhibit B.

3. The two Indictments charged Rick and Kenneth Daniels with several crimes stemming from an alleged fraudulent insurance claim made by Kenneth Daniels for the loss of a certain motor home that was, as suggested by and indicated in the Indictments intentionally set ablaze by Kenneth and/or Rick Daniels. (See Exhibit A and B.)

4. As a result, the two faced a multi-count criminal prosecution in the case captioned *United States of America v. Daniels, et al.*, case number 00-CR-202, in the United States District Court for the Northern District of Indiana, Hammond Division. (See Exhibit A and B.)

5. A jury trial was held in that matter from October 31, 2001 through November 15, 2001.

6. On November 15, 2001, the jury acquitted both Kenneth and Rick Daniels on all counts.

7. Rick Daniels and his wife Anna Daniels subsequently filed the instant 15 count civil lawsuit in 2001 against Jaskolski and NICB, the gravamen of which is that NICB, Jaskolski and other parties maliciously prosecuted the Daniels by intentionally

causing the Federal criminal prosecution to be instituted against them. A true and accurate copy of the Complaint in this action is attached as Exhibit C.

B. The Westfall Act.

8. In 1988, Congress amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the "Westfall Act" as the law was authored in response to the Supreme Court's holding in *Westfall v. Erwin*, 484 U.S. 292 (1988).

9. The Westfall Act made clear that employees of the federal government have immunity from common law tort actions for acts undertaken in the scope of their official duties.

10. Congress recognized, in enacting Westfall, that such immunity is "essential if Federal employees [a]re to be willing to carry out the duties of their office." H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988).

11. The Westfall Act defines the term "employee" broadly to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671.

12. The Westfall Act generally provides that a plaintiff's remedy against the United States for, among other things, personal injury arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding for money damages. 28 U.S.C. § 2679(b)(1).

13. Moreover, the Westfall Act provides that the U.S. Attorney General "shall defend any civil action or proceeding brought in any court against any employee of the Government . . . for any such damage or injury."

14. If the Attorney General makes such a certification, then the suit is deemed to be one against the United States, which is then substituted for the employee as the defendant to the tort action. The individual defendant is dismissed from the suit, and the case proceeds against the United States alone, pursuant to the provisions of the FTCA (including removal to federal court). 28 U.S.C. 2679(d)(2); *see*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995).

15. The Westfall Act further provides that the Attorney General shall certify whether the conduct complained of fell within the scope of the defendant's federal employment. 28 U.S.C. § 2679(c).

16. Alternatively, federal regulation has permitted and delegated to the United States Attorney for the applicable judicial district (i.e. the United

States Attorney for the Northern District of Indiana) to make such certification on the Attorney General's behalf. See, 28 C.F.R.; § 15.4(a).

17. As of the date of this Petition, the U.S. Attorney had declined to certify that Jaskolski's and the NICB's allegedly tortious actions were within the scope of their federal employment.

18. The Westfall Act provides:

> In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted, as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall

be remanded to the State court. 28 U.S.C. § 2679(d)(3)

19. Rule 4 of the Federal Rules of Civil Procedure was amended in 1993. The provisions for serving process of on the United States were moved from Rule 4(d)(4) to Rule 4(i)

20. Jaskolski and the NICB now bring this petition for a certification that their allegedly tortious actions were conducted within the scope of their employment of the United States. Such a certification is appropriate because:

a. Jaskolski and the NICB fall under the Westfall Act's definition of "employee";

b. The U.S. Attorney's Office at all times relevant treated Jaskolski and the NICB as government employees with respect to the handling of confidential grand jury materials; and

c. A Federal Judge has already made findings of fact indicating that Jaskolski and the NICB were treated by the U.S. government as government employees.

C. NICB and Jaskolski Acted as Federal Employees.

21. The NICB and Jaskolski clearly fall within the Westfall Act's broad definition of "employee." The U.S. Attorneys' office, the FBI and a federal grand jury investigated the circumstances of an insurance claim brought by plaintiff Rick Daniels pertaining to

a fire that destroyed a mobile home. Jaskolski, also at the time an employee and agent of the NICB, assisted the FBI and the U.S. Attorney's Office with its investigation of Kenneth Daniels' insurance claim. See Deposition of Joseph Jaskolski, Jr., Page 104-105. (A true and accurate copy of Jaskolski's Deposition Transcript is attached hereto as Exhibit D.)

22. The Westfall Act defines employees as "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. *See also Guccione v. United States*, 847 F.2d 1031 (2nd Cir. 1988); *and see Witt v. United States*, 462 F.2d 1261, 1263 (2nd Cir. 1972) (holding the definition of government "employee" contained in Federal Tort Claims Act was drafted to have expansive reach and should be applied with eye to general agency law rather than to formalities of employment contracts).

23. The plain language of the Westfall Act states that an "employee" is defined by his actions, not his title, duration of service or source of compensation. 28 U.S.C. § 2671.

24. Jaskolski's actions bring him and the NICB within the Westfall Act's definition of "employee".

25. The FTCA expressly defines "[e]mployee of the government" to include "officers or employees of any federal agency." 28 U.S.C. 2671. "Federal agency," in turn, expressly includes "corporations primarily

acting as instrumentalities or agencies * * * of the United States," 28 U.S.C. §2671.

26. Jaskolski was exempt from liability under the Westfall Act because he is an "officer" or "employee" of the corporation, *i.e.* the NICB, "primarily acting as [an] instrumentalit[y] or agenc[y] * * * of the United States."

27. Jaskolski initially received a request from Liberty Mutual Insurance Company pertaining to the underlying fire loss claimed by the Daniels. (Exhibit D, Pages 104-105.)

28. Jaskolski investigated the matter and saw inconsistencies in certain statements and other records. (Exhibit D, Pages 104-105.)

29. He then immediately took the matter to the Federal Bureau of Investigation's "white collar" crime unit for additional investigation. (Exhibit D, Pages 104-105.)

30. Following that, the U.S. Attorney and the FBI requested that Jaskolski perform services on their behalf because it required his experience with not only the background of the Daniels' claim, but Jaskolski's experience in investigating other instances of insurance fraud and suspected insurance fraud.

31. In a related action in the United States District Court for the Northern District of Indiana (initiated by Jaskolski and the NICB for injunctive relief concerning the taking of discovery in this case), the U.S. District Court made findings of fact that,

once Jaskolski brought the matter to the FBI, Jaskolski came under the U.S. Attorney's and the FBI's control. (See August 31, 2004 Order of United States District Judge Rudy Lazano, Page 3. A true and accurate copy of Judge Lazano's August 31, 2004 Order is attached hereto as Exhibit E.)

32. In that new role and under the FBI's control, Jaskolski accompanied FBI Special Agent Campbell during his site inspection (Exhibit D, Pages 122-123), he observed the FBI taking photographs (Exhibit D, Page 122), he observed the preparation of FBI Form 302's (Exhibit D, Page 137). and he accompanied Assistant U.S. Attorney Clarence Butler and FBI Special Agent Timothy Campbell for witness interviews (Exhibit D, Pages 135-138.)

33. Jaskolski was working hand-in-hand with and under the direction and control of federal law enforcement in the investigation and prosecution of criminal charges. (See ¶ 42 below, see Exhibit E, Page 3, and see Affidavit of Joseph Jaskolski, a true and accurate copy of which is attached as Exhibit F.)

34. Following March 4, 1999, Jaskolski further devoted almost all of his work to the Daniels case in assisting the United States Government. (Exhibit F.)

D. <u>The U.S. Attorney Treated Jaskolski as a Federal Employee</u>.

35. During the course of the criminal investigation of the Daniels, the U.S. Attorney's office treated

Jaskolski as if he were a federal employee insofar as Jaskolski was deemed to be covered by Rule 6 of the Federal Rules of Criminal Procedure, more specifically, Rule 6(e)(3)(A)(ii).

36. Rule 6(e)(3)(A)(ii) permits disclosure of grand jury matters only to *government personnel.*

37. Jaskolski executed a Federal Criminal Rule 6(e) Certification on August 24, 1998. (A true and accurate copy of this Certification is attached as Exhibit G.)

38. The U.S. Attorney filed a notice of disclosure with the Federal Criminal Court pursuant to Rule 6(e)(3)(B). (Exhibit D, Pages 105, 122-123, 135-138; Exhibit E, Pages 2-3).

39. Within the Certification, Jaskolski acknowledged that any grand jury matters to which he was given access "may not be disclosed or used for any civil or administrative purpose or for any purpose other than for the grand jury investigation, except by order of the Court" and that Jaskolski's "knowing violation of Rule 6(e) may be punished as a contempt of Court." (Exhibit G.)

40. In this respect, Jaskolski was treated the same as any of the employees of the FBI or U.S. Attorney's office who were similarly involved in investigating the Daniels criminal case.

E. The Federal Courts have Already Found the U.S. Government Treated Jaskolski and the NICB as "Employees."

41. In a companion Federal proceeding, Jaskolski filed a Motion for Preliminary Injunction (and subsequently an Amended Motion) on August 18, 2004 for a ruling on the appropriateness of certain discovery requests may [sic] by plaintiffs Rick and Anna Daniels in this case that delved into materials related to sealed grand jury proceedings. (A true and accurate copy of the Amended Motion is attached hereto as Exhibit H.)

42. In the context of that matter, the United States filed a brief in which the United States admitted that "Jaskolski's actions here were at the direction of the FBI and/or the United State's [sic] Attorney's office." A true and accurate copy of the United States brief is attached as Exhibit I.

43. First Assistant U.S. Attorney David Capp and Assistant U.S. Attorney Carol Davila appeared at an August 23, 2004 hearing in Federal Court on behalf of the United States of America. (See August 23, 2004 Transcript of Proceedings in Case Number 03-CV-479, Page 2; a true and accurate copy of this Transcript is attached hereto as Exhibit. J.)

44. During the hearing, Attorney Capp stated:

> " . . . matters occurring before the Grand Jury is a very difficult issue to parse. And while I respect [Daniels' counsel] saying we are not seeking what is going on before the grand jury, the reality is

here, your Honor, we had a person working hand-in-hand with the FBI on an extensive Grand Jury investigation. So it [becomes] very problematic for Grand Jury secrecy to start parsing the conduct of that individual, and that is the interest we seek to protect. And we acknowledge there is an issue as to Mr. Jaskolski's coverage, but the fact is he did it, and now we have some interest to protect." (Exhibit J, Page 30.)

45. During the same hearing, the presiding judge acknowledged that there was a confidentiality agreement made between Jaskolski and the U.S. Attorneys' Office in the form of the Rule 6 Certification. (Exhibit J, Page 30.)

46. On August 31, 2004, the Federal Court entered an order granting Jaskolski and NICB's Amended Motion for Preliminary Injunction against the Daniels prohibiting the plaintiffs from obtaining discovery materials protected by grand jury secrecy rules without first petitioning the U.S. District Court for such disclosure. (Exhibit E.)

47. Within the August 31, 2004 Order, the Federal Court made the following findings of fact:

a. "During the course of his employment with the NICB, Jaskolski has worked with the FBI and the United States Attorney's Office on numerous insurance fraud cases, including an investigation of Rick Daniels and Kenneth Daniels ('Daniels Brothers') stemming from an insurance claim that arose

from an October 23, 1998, motorhome fire" (Exhibit E, Page 2);

b. "the United States Attorney's Office treated Jaskolski as if he fell within the provision of Rule 6(e)(3)(A)(ii) that permits disclosure of grand jury matters to government personnel, and filed a notice of disclosure with the Court pursuant to Rule 6(e)(3)(B)" (Exhibit E, Page 3);

c. "Both the United States Attorney's Office and Jaskolski relied upon their belief that Jaskolski was 'government personnel' within the meaning of Rule 6" (*Id.*); and

d. "Jaskolski worked side-by-side with the FBI and the United States Attorney's Office, and his actions were at their direction" (*Id.*).

48. The Court concluded that Jaskolski was sufficiently connected with the grand jury process like the individuals listed in Rule 6(e)(2)(B) to evoke the protections of Rule 6(e). (Exhibit E, Page 11.) In other words, Jaskolski was properly considered "government personnel" based on the findings of fact pertaining to his actions in assistance of the U.S. Attorney's office and the FBI.

F. As Employees, Jaskolski and the NICB are Entitled to Certification.

49. In an action against a government employee or an employee of a non-governmental agent of the government, the FTCA provides that the government

"shall defend any civil action or proceeding brought . . . against any employee of the Government or his estate for any [covered] damage or injury." 28 U.S.C. § 2679(c).

50. Prior to October 28, 2004, Jaskolski and the NICB communicated their request for certification to the U.S. Attorney for the Northern District of Indiana in his capacity as the designee of the Attorney General. The request was not declined until April 2006.

51. According to the Westfall Act, if the Attorney General, or designated United States Attorney, does not certify the requesting persons as "employees", the trial court may do so. "In the event that the Attorney General has refused to certify scope or office or employment . . . , the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3); 28 C.F.R. § 15.4(a).

52. Such certification by the court has the same effect as certification by the Attorney General. *Id.*

53. This Court or any federal court to which this matter is removed has the authority to grant this Petition and certify that, in operating under the direction of the U.S. Attorney and the FBI, Jaskolski and the NICB were acting as "employees" of the Federal Government for purposes of the Westfall Act.

54. As shown by the Certification, the United States was already treating Jaskolski and NICB as employees within the meaning of the Westfall Act by

treating Jaskolski as "government personnel" in accordance with Federal Criminal Rule 6(e)(3)(A)(ii).

55. By simple operation of law, then, the United States must further be substituted in as defendants in place of Jaskolski and the NICB.

CONCLUSION

WHEREFORE Defendants JOSEPH JASKOLSKI and NATIONAL INSURANCE CRIME BUREAU request that this Honorable Court enter an Order:

A. Granting this Petition;

B. Certifying that all of Joseph Jaskolski and the National Insurance Crime Bureau's actions that are alleged to give rise to the plaintiffs' causes of action were performed in the scope of Jaskolski's and the NICB's federal employment;

C. Substituting the United States as party defendant in place of Jaskolski and the NICB; and

D. Granting such other and further relief as this Court deems just and proper under the circumstances.

Respectfully submitted,

JOSEPH JASKOLSKI and THE NATIONAL INSURANCE CRIME BUREAU

By: /s/ John Bullario
One of their attorneys

CERTIFICATION OF SERVICE

I hereby certify that on the 13th day of June, 2006, service of a true and complete copy of the above and foregoing pleading was made upon all counsel of record shown on the attached service list by depositing same in the U.S. Mail at 9013 Indianapolis Boulevard Highland, Indiana 46322, in envelopes properly addressed and with sufficient first-class postage affixed.

I hereby further certify that this Petition has been served on the Attorney General of the United States of America and the Unites [sic] States Attorney for the Northern District of Indiana in accordance with Rule 4(i) of the Federal Rules of Civil Procedure, by sending the same by Certified United States Mail on the date written above, and that the same was also served by hand delivery on the United States Attorney for the Northern District of Indiana.

/s/ Timothy A. Alspach
Timothy A. Alspach

John J. Bullaro, Esq. # 11885-45
Cornelius J. Harrington, III, Esq. # 17051-45
BULLARO & CARTON, P.C.
9013 Indianapolis Boulevard
Highland, Indiana 46322
(219) 838-4840

STATE OF INDIANA	)	IN THE LAKE SUPERIOR COURT
	) SS.	ROOM NUMBER ONE
COUNTY OF LAKE	)	SITTING IN HAMMOND, INDIANA

RICK DANIELS and ANNA DANIELS, Plaintiffs, vs. LIBERTY MUTUAL INSURANCE CO., JOSEPH JASKOLSKI, NATIONAL INSURANCE CRIME BUREAU, THOMAS KERR, VEHICLE INVESTIGATIONS NATIONWIDE, INC., MICHAEL A. EVANS, Individually and d/b/a AIT LABORATORIES, Defendants.	)	CAUSE NO.: 45D01 0112 CT 193

DEFENDANTS' MOTION FOR RULING ON THEIR PETITION FOR CERTIFICATION UNDER THE WESTFALL ACT

Defendants, Joseph Jaskolski and National Insurance Crime Bureau (collectively "Jaskolski"), by their counsel, Bullaro & Carton, P.C., move the Court to find pursuant to their previously filed Petition for Certification of Scope of Employment that Jaskolski, while acting under the control of the United States government during the investigation and prosecution

of Rick Daniels, was an "employee of the government" pursuant to the Westfall Act, 28 U.S.C. 1679(d)(3).

The Plaintiffs, Rick and Anna Daniels, complain that they were allegedly harmed because Jaskolski assisted the government in investigating and prosecuting Rick Daniels for insurance. fraud and other crimes in *United States v. Daniels*, No. 2:00-CR-202. There is no dispute the government, through FBI Agent Campbell and Assistant U.S. Attorney (AUSA) Butler, directed the detailed performance of every aspect of Jaskolski's involvement in that investigation and prosecution. There is no question that if either FBI Agent Campbell or AUSA Butler had themselves done what they directed Jaskolski to do, Campbell and Butler would have been entitled to the protections of the Westfall Act as "employees of the government." The law requires that Jaskolski – who was only a third hand under the control of Campbell and Butler – be certified as an "employee of the government" under the Westfall Act as well.

It is indisputable that an "employee of the government" under the Westfall Act includes an unpaid volunteer such as Jaskolski: a loaned employee of a non-governmental employer who is placed under direct supervision of a federal agency. *Logue v. United States*, 412 U.S. 521, 531 (1973). The answer to the question of whether Jaskolski was an "employee of the government" is thus as easy as 1-2-3:

1. To be "considered government employees, it must be demonstrated that ***the government***

is authorized to direct or control the detailed performance of the defendant's work." *Quilico v. Kaplan*, 749 F.2d 480, 482 (7th Cir. 1984), citing *Logue v. United States*, 412 U.S. 521, 93 S.Ct. 2215 (1973) and *United States v. Orleans*, 425 U.S. 807, 814-15, 96 S.Ct. 1971 (1976).

2. Jaskolski so testified: "***I did only what I was told, to do by either Agent Campbell or AUSA Butler. . . . I always acted under the direct supervision or control of either Agent Campbell or AUSA Butler.***" (Jaskolski aff., pars. 8-9.)

3. The Government agreed: ***Jaskolski's "actions here were at the direction of the FBI and/or the United States Attorney's Office."*** (United States Memorandum, Exhibit I, p. 1.)

Jaskolski is thus entitled to be certified as an "employee of the government" under the Westfall Act. The United States must be substituted as a defendant for all claims arising out of Jaskolski's alleged actions or omissions while he was assisting the government in the investigation and prosecution of the Daniels.

CONCLUSION

Wherefore, for the reasons set forth above, the Defendants Joseph Jaskolski and National Insurance Crime Bureau respectfully pray that this Honorable Court certify that Jaskolski was an "employee of

the government" pursuant to 28 U.S.C. 1671 and 1679(d)(3) for his work on the Daniels case.

Respectfully submitted,

BULLARO & CARTON, P.C.

By: /s/ Cornelius J. Harrington, III
Cornelius J. Harrington, III
#17051-45

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Phone: (219) 838-4840

STATE OF INDIANA)		IN THE LAKE
	) SS.	SUPERIOR COURT
COUNTY OF LAKE)		ROOM NUMBER ONE
		SITTING IN
		HAMMOND, INDIANA
RICK DANIELS and ANNA DANIELS,	)	
Plaintiffs,	)	
vs.	)	
LIBERTY MUTUAL INSURANCE CO., JOSEPH JASKOLSKI, NATIONAL INSURANCE CRIME BUREAU, THOMAS KERR, VEHICLE INVESTIGATIONS NATIONWIDE, INC., MICHAEL A. EVANS, Individually and d/b/a AIT LABORATORIES,	)	Cause No. 45D01 0112 CT 193
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RULING ON PETITION FOR CERTIFICATION UNDER THE WESTFALL ACT

The Defendants, Joseph Jaskolski and National Insurance Crime Bureau (collectively "Jaskolski"), present their Memorandum in Support of their Motion for Ruling on their previously filed Petition for Certification of Scope of Employment. The Court should certify that Jaskolski, while acting under the control of the United States government during the

investigation and prosecution of Rick Daniels, was an "employee of the government" pursuant to the Westfall Act, 28 U.S.C. 1679(d)(3).

The Plaintiffs, Rick and Anna Daniels, complain that they were allegedly harmed because Jaskolski assisted the government in investigating and prosecuting Rick Daniels for insurance fraud and other crimes in *United States v. Daniels,* No. 2:00-CR-202 (the "Daniels case"). There is no dispute the government, through FBI Agent Campbell and Assistant U.S. Attorney (AUSA) Butler, directed the detailed performance of every aspect of Jaskolski's involvement in that investigation and prosecution. There is no question that if either FBI Agent Campbell or AUSA Butler had themselves done what they directed Jaskolski to do, Campbell and Butler would have been entitled to the protections of the Westfall Act as "employees of the government." The law requires that Jaskolski – who was only a third hand under the control of Campbell and Butler – be certified as an "employee of the government" under the Westfall Act as well so that the government can take responsibility for what were, in essence, its own acts.

It is indisputable that an "employee of the government" under the Westfall Act includes an unpaid volunteer such as Jaskolski: a loaned employee of a non-governmental employer who is placed under direct supervision of a federal agency. *Logue v. United States,* 412 U.S. 521, 531 (1973). The answer to the question of whether Jaskolski was an "employee of the government" is thus as easy as 1-2-3:

1. To be "considered government employees, it must be demonstrated that ***the government is authorized to direct or control the detailed performance of the defendant's work.***" *Quilico v. Kaplan,* 749 F.2d 480, 482 (7th Cir. 1984), citing *Logue v. United States,* 412 U.S. 521, 93 S.Ct. 2215 (1973) and *United States v. Orleans,* 425 U.S. 807, 814-15, 96 S.Ct. 1971 (1976).

2. Jaskolski so testified: ***"I did only what I was told to do by either Agent Campbell or AUSA Butler. . . . I always acted under the direct supervision or control of either Agent Campbell or AUSA Butler."*** (Jaskolski aff., Exhibit B, pars. 8-9.)

3. The Government agreed: ***Jaskolski's "actions here were at the direction of the FBI and/or the United States Attorney's Office."*** (United States Memorandum, Exhibit I, p. 1.)

Jaskolski is thus entitled to be certified as an "employee of the government" under the Westfall Act. The United States must be substituted as a defendant for all claims arising out of Jaskolski's alleged actions or omissions while he was assisting the government in the investigation and prosecution of the Daniels.

INTRODUCTION

After the complaint in this action was filed, Jaskolski asked the United States Attorney General to certify that Jaskolski, by assisting the FBI and U.S. Attorney in the investigation and prosecution of Daniels, was acting as an "employee of the government" as defined under the Westfall Act. Although the government acknowledged it controlled every aspect of Jaskolski's involvement in the investigation and prosecution of Rick Daniels, the Attorney General refused to accept responsibility for those actions and declined the request for certification.

On June 13, 2006, Jaskolski then filed in this case a Petition for Certification of Scope of Employment, seeking a finding that Jaskolski was an "employee of the government" under the Westfall Act pursuant to 28 U.S.C. 2679(d)(3). The United States removed the action to federal court as allowed by 28 U.S.C. 2679(d)(3).

Although the government never disputed it directed every detail of Jaskolski's involvement in the investigation and prosecution of Rick Daniels, it nonetheless continued to refuse to accept responsibility for those acts. As a result, the federal district court declined certification and remanded the case back to this Court.

The United States Court of Appeals for the Seventh Circuit in *Daniels v. Liberty Mutual Ins. Co.*, 484 F.3d 884 (7th Cir. 2007) held it did not have appellate jurisdiction over the district court's remand

order. (Exhibit H.) The Seventh Circuit accordingly acknowledged that on remand this Court should resolve anew the question of whether Jaskolski was an "employee of the government" under the Westfall Act. *Id.* at 888. In so deciding, this Court may address the question on a clean slate and may not give any preclusive effect to the federal district court opinion. *Kircher v. Putnam Funds Trust,* 547 U.S. 633, 646-47 (2006).

STATEMENT OF UNDISPUTED FACTS

Background

Kenneth Daniels owned a 1996 Raven motor home that was insured by Liberty Mutual Insurance Company. On October 23, 1998, Ken's brother, Rick Daniels, drove the motor home to a remote road at night. A fire broke out and destroyed the motor home,

Ken Daniels requested that Liberty Mutual pay for loss of the motor home but Liberty Mutual declined. It had become suspicious of the cause of the fire for several reasons, including: (1) an anonymous person called its fraud "hot line" to state that the fire was intentional; (2) an arson investigator it hired reported that the fire was started with fireworks and a liquid accelerant; and (3) Rick and Ken Daniels gave inconsistent statements.

Liberty Mutual referred Ken Daniels' claim and the results of its own investigation to NICB. NICB is a not-for-profit organization funded by member

insurance companies. Its purpose is to combat insurance fraud and vehicle theft. Eventually, an NICB supervisor assigned Jaskolski to assess Liberty Mutual's referral. After conducting an investigation, Jaskolski went to the FBI. (Jaskolski dep., Exhibit D, pp. 99-100.)

The Government requests Jaskolski's help

On April 1, 1999, Joseph Jaskolski met in person with Special Agent Timothy Campbell of the FBI to discuss the Daniels claim. (Jaskolski aff., Exhibit B, par. 2.) (All further references to Jaskolski's Affidavit in this Memorandum refer to Exhibit B.)

At that meeting, Agent Campbell decided to request that the United States Attorney's office open a criminal investigation into the Kenneth Daniels claim. (Jaskolski aff., par. 3.) At the same meeting, Agent Campbell also asked Jaskolski to assist in the investigation. (Jaskolski aff., par. 4.)

Agent Campbell, AUSA Butler and Jaskolski understood that any assistance Jaskolski provided would be subject to and controlled by the terms of the Rule 6(e) certifications Jaskolski had previously signed, as well as any and all policies, procedures, rules and regulations and laws of the federal government. In other words, Jaskolski was subject to the exact same rules as the FBI agents and United States Attorneys. In addition, by agreeing to the government's request to assist, Jaskolski was also agreeing

to match his schedule to the government's needs. (Jaskolski aff., par. 5.)

"After that first meeting with the F.B.I., I was under the control of the U.S. Attorney and the F.B.I. My investigation stemmed from their order and their direction." (Jaskolski dep., p. 105.)

Specifically, Jaskolski and the government agreed that he was assigned to assist a United States Attorney in the performance of that attorney's duty to enforce criminal law:

> Your agency has assigned you to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (Exhibit G, Rule 6(e) certification.)

Jaskolski and the government also agreed that the grand jury testimony and documents to which he would have access could be used only to assist the federal government in enforcing federal criminal law and no other purpose:

> In accordance with Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, you are being given access to those materials for the sole purpose of assisting the Government attorneys involved in the Federal Grand Jury investigations in the performance of their duties to enforce federal criminal law. . .
>
> No grand jury material may be disclosed or used for any civil or administrative purpose

> or for any purpose other than for the grand jury investigation, except by order of the Court. (Exhibit G, Rule 6(e) certification.)

Jaskolski and the government also acknowledged that he could be held in contempt if he disclosed grand jury matters in violation of the certification or Rule 6:

> A Federal Grand Jury investigation is criminal in nature, and grand jury proceedings are secret. *The unauthorized disclosure of grand jury matters is punishable as a contempt of court.* Grand jury matters may include the identities of witnesses, their testimony and the nature and content of documents and physical evidence obtained through the grand jury investigation. . . . I hereby certify that I have been fully advised and understand the Federal Grand Jury Secrecy Requirements imposed by Rule 6(e) of the Federal Rules of Criminal Procedure and that a knowing violation of Rule 6(e) may be punished as a contempt of Court." (Exhibit G, Rule 6(e) certification.)

The U.S. Attorney's office filed the necessary notice of Jaskolski's involvement with the District Court pursuant to Rule 6(e)(3)(B), thereby giving notice to the district court and the public that Jaskolski was assisting the government in performing its law enforcement duties. (Exhibit E, District Court August 31, 2004 Order, p. 3)

With regard to the Daniels, the FBI and U.S. Attorney requested Jaskolski to assist in the following areas:

a. Accompany Agent Campbell on interviews of witnesses;

b. Accompany Agent Campbell on site or other inspections;

c. Assist in reviewing documents as directed;

d. Assist in escorting of witnesses at grand jury proceedings;

e. Assist United States Attorney Clarence Butler at trial. (Jaskolski aff., par. 7.)

For all of these activities, Jaskolski did only what he was told to do by either Agent Campbell or AUSA Butler, or other FBI agents and U.S. Attorneys. (For the sake of simplicity, references to Agent Campbell or AUSA Butler include any other FBI agents or U.S. Attorneys who may have been involved in the case as well.) (Jaskolski aff., par. 8; Jaskolski dep., p. 105.)

Agent Campbell or AUSA Butler always decided what particular result to achieve and they alone decided also to achieve that result in a particular way at a particular location at a particular time with particular documents or persons. (Jaskolski aff., par. 9; Jaskolski dep., p. 105, 258-59.) Jaskolski did not and could not exercise any independent judgment of his own with regard to any aspect of the investigation, indictment or prosecution of the Daniels. There

were no legal or professional considerations that would have allowed Jaskolski to disregard the control or directions of Agent Campbell or AUSA Butler. (Jaskolski aff., par. 10.) Indeed, both Jaskolski *and the United States agree* Jaskolski always acted under the direct supervision or control of either Agent Campbell or AUSA Butler:

> *Jaskolski's "actions here were at the direction of the FBI and/or the United States Attorney's Office."* (Exhibit I, Memorandum by United States, p. 1.) (See also Jaskolski dep., p. 105, 258-59.)

Both Jaskolski and *the United States agree* Jaskolski worked "hand-in-hand" with the government:

> The reality is here, your Honor, we had a person working hand-in-hand with the FBI on an extensive Grand Jury investigation." (Exhibit J, August 23, 2004 transcript, p. 30)

Both Jaskolski and *the United States agree* that the FBI and the U.S. Attorney treated Jaskolski as "government personnel" subject to the control of the United States:

> The government acknowledges *its actions in treating Jaskolski as "government personnel"*. . . . (Exhibit I, Memorandum by United States, p. 2)

Even when looking at the details of Jaskolski's performance, the government was always in control. Either Agent Campbell or AUSA Butler decided who

to interview, and when and where to interview the witnesses. Jaskolski could not, and did not, ever decide on his own initiative to interview any person or witness. He could not, and did not, see or interview. any witnesses in any other place or under any other circumstances other than as directed by either Agent Campbell or AUSA Butler. He could not, and did not, see or interview any witnesses on his own; he only accompanied Agent Campbell or AUSA Butler and either one of them was always physically present and directly supervising or directing Jaskolski. (Jaskolski aff., par. 11, Jaskolski dep., p. 239.)

Specifically, Campbell or Butler would call Jaskolski and instruct him to come to a meeting or witness interview:

Q. How did you know to go to a meeting?

A. Tim Campbell instructed me to come. (Jaskolski dep., p. 140.)

Campbell would call Jaskolski to go with him on witness interviews. (Jaskolski dep., p. 257.) For example, Campbell called Jaskolski to his office and told him they were going to go interview Rick Daniels. The idea to interview Rick Daniels was not a joint idea: "Campbell calls me and says that we would go." (Jaskolski dep., pp. 238-39.)

During these interviews, Jaskolski was subject to the same policies, procedures, rules and laws to which Agent Campbell or AUSA Butler were bound. Jaskolski always followed their lead and direction

during the interviews. (Jaskolski aff., par. 11; Jaskolski dep., p. 239.)

Likewise, Agent Campbell or AUSA Butler decided what documents to subpoena or otherwise obtain, as well as what inspections to conduct. Agent Campbell or AUSA Butler always decided the purpose for any inspection or document review. Agent Campbell or AUSA Butler told Jaskolski what information they were looking for and Jaskolski complied with this direction during the document review or inspection. Jaskolski did not, and could not, conduct any inspection or obtain or review any documents other than as directed by either Agent Campbell or AUSA Butler. Jaskolski never conducted any inspection on his own; he only accompanied Agent Campbell or AUSA Butler and either one of them was always physically present and directly supervising or directing Jaskolski during the inspection. (Jaskolski aff., par. 12.)

During grand jury proceedings, while AUSA Butler presented witnesses to the grand jury, Jaskolski assisted Agent Campbell in making sure other witnesses appeared and that the witnesses were kept separate. Jaskolski was always physically accompanied and directed and supervised by Agent Campbell or AUSA Butler during these proceedings and he did only what he was told to do by them. (Jaskolski aff., par. 13.)

Jaskolski also attended the trial only to assist Agent Campbell or AUSA Butler according to their

directions. For example, Jaskolski again assisted with witnesses and responded to AUSA Butler's requests for documents or other information obtained during the investigation or grand jury proceedings. Jaskolski did not do anything on his own initiative at the trial and he was always directly supervised by either Agent Campbell or AUSA Butler. (Jaskolski aff., par. 14.)

From April 1, 1999 to the end of the Daniels' trial, no employee of NICB ever had any involvement whatsoever with the investigation or prosecution of the Daniels, with the sole exception that an employee of NICB prepared, according to the directions of AUSA Butler, a chart used as an exhibit at trial. (Jaskolski aff., par. 15.)

From April 1, 1999 to the end of the Daniels' trial, Jaskolski was bound by the terms of the Rule 6(e) certification and consequently could not and did not report to anyone at NICB any information whatsoever regarding the investigation or prosecution of the Daniels other than to inform it of the general fact that he was involved in the investigation. (Jaskolski aff., par. 16.)

No one else at NICB was certified under Rule 6(e) and consequently NICB could not and did not exercise directly or indirectly any influence, control or review over Jaskolski's involvement in the investigation and prosecution of the Daniels. For the same reason, no one at NICB did or could give Jaskolski any direction as to witness interviews, document

review, inspections, or the grand jury proceedings or trial. (Jaskolski aff., par.. 17.)

No one at NICB had the right or authority to allow Jaskolski to perform any task related to the Daniels investigation, grand jury proceedings and trial. To the contrary, Agent Campbell and AUSA Butler were the only ones who could allow Jaskolski to be involved in the investigation and prosecution of the Daniels. (Jaskolski aff., par. 18.)

That Agent Campbell and AUSA Butler had such right and authority under 28 CFR 0.138 is demonstrated by the fact that they (and other government employees) repeatedly requested Jaskolski's assistance in numerous governmental investigations and prosecutions over many years and that both their superiors in the United States Attorney's office and the federal judges in Indiana were aware of and acquiesced in Jaskolski's involvement, without exception. (Jaskolski aff., par. 18.)

Agent Campbell and AUSA Butler had the sole right and authority to terminate Jaskolski's participation in the investigation and prosecution of the Daniels and could have exercised that right at any time for any reason. In addition, even if Jaskolski had not remained an employee of NICB, Agent Campbell and AUSA Butler could have allowed Jaskolski to continue to participate (under their detailed direction and supervision) in the investigation and prosecution of the Daniels. (Jaskolski aff., par. 19.)

ARGUMENT

1. Jaskolski was an "employee of the government" under the Act.

Jaskolski was an "employee of the government" as defined in the Westfall Act. An "employee of the government" includes private individuals or loaned servants who are not formally employed by the government as long as the federal government has the authority, by agreement, to direct the details of that person's performance. As the undisputed facts show, and as the government has already admitted, the government directed the details of all of Jaskolski's activities in the investigation and prosecution of the Daniels.

A. The Westfall Act defines government "employee" to include private individuals or loaned employees who are not on the government payroll.

The Westfall Act defines a government "employee" to include any "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. This definition was intended to be applied broadly. *Witt v. United States,* 462 F.2d 1261, 1263 (2nd Cir. 1972); *Ferguson v. United States,* 712 F.Supp. 775, 781 (N.D. Cal. 1989).

As the definition makes clear, even private individuals who are not on the government's payroll may

be considered "employees of the government." *Patterson & Wilder Constr. Co. v. United States,* 226 F.3d 1269, 1274 (11th Cir. 2000). The definition of "employee" is designed to cover an individual or even an employee of a non-governmental employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement. *Logue v. United States,* 412 U.S. 521, 531, 93 S.Ct. 2215, 2221 (1973).

The critical factor in determining whether one is a "person acting on behalf of a federal agency in an official capacity" is whether the government was authorized to direct or control the detailed performance of that person's work. *United States v. Orleans,* 425 U.S. 807, 814, 96 S.Ct. 1971 (1976); *Logue v. United States,* 412 U.S. 521, 93 S.Ct. 2215 (1973); *Quilico v. Kaplan,* 749 F.2d 480, 482 (7th Cir. 1984). It is not necessary that the government continually control all aspects of the individual's activities, so long as it has the authority to do so given the nature of the task. *Patterson & Wilder Constr. Co. v. United States,* 226 F.3d 1269, 1274 (11th Cir. 2000); *Ezekiel v. Michel,* 66 F.3d 894, 904 (7th Cir. 1995).

B. <u>The government, by agreement, had the authority to direct every aspect of Jaskolski's involvement in the Daniels case.</u>

The "control" test set forth in *Orleans, Logue* and *Quilico* has been met here and Jaskolski was a

government "employee." That the government controlled the details of Jaskolski's activities is undisputed. Indeed, as detailed in the Statement of Facts, the government has *admitted* that Jaskolski's actions "here were at the direction of the" government. (Exhibit I, United States Memorandum, p. 1)

The courts have uniformly found persons in Jaskolski's position to be "employees" of the federal government. For example, in *United States v. Becker,* 378 F.2d 319 (9th Cir. 1967), an airplane pilot, McIlrath, agreed to make his aircraft and his services as pilot available to the Forest Service, a federal agency. McIlrath was selected by Forest Service personnel based on his availability, technical competence and the suitability of his aircraft. McIlrath agreed to meet Forest Service requirements and agreed to obey the directives of Forest Service personnel. Forest Service personnel supervised each flight and told McIlrath "when and where to go and what to do." The court ruled that McIlrath was an "employee" of the government under the Act.

In *Martarano v. United States,* 231 F.Supp. 805, 807-08 (D. Nev. 1964), Sweeney was employed as a mammal control agent by the State of Nevada. His wages and benefits were paid by the State, but no employee or officer of the State directed or supervised Sweeney in the performance of his work. Instead, Nevada and a federal agency agreed that his activities would be supervised by federal officials. The Court ruled that Sweeney was an "employee" of the federal government under the Westfall Act.

Similarly, in *Ezekiel v. Michel,* 66 F.3d 894 (7th Cir. 1995), Dr. Michel was in the last year of his medical residency under the auspices of the Chicago Medical School and, as part of the residency program, was assigned to work at the VA hospital, a federal agency. Michel did not receive any compensation from the VA hospital. The Seventh Circuit ruled that Michel was a federal "employee" of the VA under the Westfall Act because he was subject to the supervision and control of the VA hospital medical staff.

In *Bird v. United States,* 949 F.2d 1079 (10th Cir. 1991), a temporary placement agency referred a certified registered nurse anesthetist to the Indian Hospital, a federal agency. The temporary placement agency did not exercise directly or indirectly any control over the anesthetist. The court ruled that the anesthetist was an "employee of the government" because he served under the supervision of the surgeon as an integral part of the government operating team. See also *B&A Marine Co., Inc. v. American Foreign Shipping Co., Inc.,* 23 F.3d 709 (2nd Cir. 1994) (federal agency instructed defendant in detail as to what actions it should take and thus defendant was federal government employee); *Bravo v. United States,* 403 F.Supp.2d 1182, 1195-96 (S.D. Fla. 2005) (physician subject to supervision of government was "government employee"); *Thompson v. United States,* 504 F.Supp. 1087 (D. S.D. 1980) (police officer hired and paid by tribal council was employee of federal agency Bureau of Indian Affairs because employees of BIA supervised his activities); *Clifford v. United*

States, 308 F.Supp. 957, 958-59 (D. S.D. 1970) (government impliedly reserved supervision of work and plumber was thus "government employee").

In this case, as in all of the above-cited cases, it is undisputed that FBI Agent Campbell and AUSA Butler had the authority to supervise and control Jaskolski's activities in the investigation and prosecution of the Daniels. Just as in *Becker,* Agent Campbell and AUSA Butler supervised all of Jaskolski's activities with regard to the Daniels' case and told Jaskolski "when and where to go and what to do." Agent Campbell and AUSA Butler always decided what particular result to achieve and they alone decided also to achieve that result in a particular way at a particular location at a particular time with particular documents or persons. (Jaskolski aff., pars. 7-10; Jaskolski dep., p. 105, 258-59.)

Just as in *Martarano, Ezekiel* and *Bird,* the details of all of Jaskolski's activities on the Daniels case were directed by Agent Campbell and AUSA Butler and not at all by anyone at NICB. Indeed, no one at NICB even knew what Jaskolski was doing other than that he was assisting the government. (Jaskolski aff., pars. 15-17.)

And, as in all of the above-cited cases, Jaskolski agreed to follow – and did in fact follow – the government's directions as to the details of his activities. (Jaskolski aff., par. 5; Jaskolski dep., p. 107.) Agent Campbell and AUSA Butler were always physically present to ensure he complied with all of

their detailed directions. See *Cannady v. United States,* 155 F.Supp.2d 1379, 1383 (M.D. Ga. 2001) (program technician governed by oath of office in which she swore to carry out procedures of federal agencies). As Jaskolski testified, "After that first meeting with the F.B.I., I was under the control of the U.S. Attorney and the F.B.I. My investigation stemmed from their order and their direction." (Jaskolski dep., p. 105.)

Even looking at the specific details of Jaskolski's activities, the parties always understood Jaskolski was acting under the government's control. Briefly: Campbell or Butler would decide who to interview and when and where to interview the witnesses. Campbell would call Jaskolski and instruct him to attend. At the interviews and inspections, Jaskolski would always follow Campbell's lead and direction. Jaskolski could not decide who to interview or what documents to inspect. Campbell or Butler would tell Jaskolski what information they were looking for and Jaskolski complied with this direction. During grand jury proceedings and the trial, Jaskolski only did what he was told to do. (Jaskolski aff., pars. 8-14; Jaskolski dep., pp. 105-06, 111, 140, 238-39, 257-59.)

Furthermore, the government has also admitted that it treated Jaskolski as "government personnel." (Exhibit I, United States Memorandum, p. 2) While it is true no court has yet found Jaskolski was "government personnel" within the meaning of Federal Rule of Criminal Procedure 6(e), that the government treated him as government personnel necessarily

supports the inference that both parties believed the government had the authority to direct the details of Jaskolski's performance just as it did every other government personnel, such as Campbell and Butler.

In short, the government controlled every facet of Jaskolski's performance. Jaskolski was nothing more than an extra hand for Campbell and Butler. Jaskolski had no independent discretion to do anything related to the investigation and prosecution and could only act as he was instructed by the government. The government directly supervised every detail of Jaskolski's performance and thus "controlled" Jaskolski under *Orleans, Logue* and *Quilico.* Therefore, Jaskolski was an "employee of the government" under the Westfall Act.

2. The government's attempts to avoid responsibility for the actions it directed Jaskolski to take are without merit and contrary to the law.

The United States Attorney General has attempted to avoid accepting responsibility for the actions it directed Jaskolski to take, but in doing so, it has raised only frivolous contentions that are directly contrary to the law.

A. The definition of "employee" includes unpaid volunteers and precludes consideration of who paid Jaskolski.

The government first suggests that the definition of "employee of the government" does not include unpaid volunteers, a contention that is directly contrary to the terms of the statute itself and the case law. Jaskolski is an "employee of the government" regardless of whether the government paid his salary.

The Westfall Act defines a government "employee" to include persons assisting the government "whether with or *without* compensation." 28 U.S.C. 2671. As the definition makes clear, even private individuals who are not on the government's payroll – volunteers or gratuitous employees – may be considered "employees of the government." *Ezekiel v. Michel,* 66 F.3d 894, 900 (7th Cir. 1995); *Patterson & Wilder Constr. Co. v. United States,* 226 F.3d 1269, 1274 (11th Cir. 2000); *Ferguson v. United States,* 712 F.Supp. 775, 782 n.7 (N.D. Cal. 1989); *Martarano v. United States,* 231 F.Supp. 805 (D. Nev. 1964). See also *Celaya v. Hall,* 85 P.3d 239, 242 (N.M. 2004) (volunteers acting on behalf of the government are "employees" entitled to the protections of the Act).

Furthermore, the definition of the term "employee" in the Westfall Act incorporates the common law definition of master-servant. *Logue v. United States,* 412 U.S. 521, 527-28, 93 S.Ct. 2215, 2219 (1973). Under the common law as incorporated into the Act, the liability of a "master" or "employer" for

the torts of his "servant" or "employee" extends to situations in which the servant is a volunteer (or gratuitous employee) acting under a similar degree of control as a paid employee. *Beul v. Asse International, Inc.*, 233 F.3d 441, 444 (7th Cir. 2000); *Southport Little League v. Vaughn*, 734 N.E.2d 261, 268 n.6 (Ind.App. 2000) (unpaid volunteer was "employee" of Little League); *Colorado Compensation Ins. Authority v. Jones,* 131 P.3d 1074, 1080-81 (Col.App. 2005) (unpaid assistant was employee); *Buisker v. Thuringer,* 648 N.W.2d 817, 820-21 (S.D. 2002) (friend assisting in removal of addition was gratuitous employee); Restatement (Second) of Agency, §225 (volunteer may be employee).

Therefore, it is *"of no moment"* that Jaskolski was not paid by the government while working for the FBI and U.S. Attorney's Office. *Ezekiel v. Michel,* 66 F.3d 894, 900 (7th Cir. 1995). The crucial question is not the source of a defendant's salary but rather whether the defendant's day-to-day operations were supervised by the federal government. *Thompson v. United States,* 504 F.Supp. 1087, 1089 (D. S.D. 1980). As the cited cases all demonstrate, that Jaskolski was not paid by the federal government is irrelevant. As Jaskolski could still be an "employee of the government" even if he was not paid by the government, the government's related contention that Agent Campbell and AUSA Butler allegedly had no authority to put Jaskolski on the government payroll is also irrelevant.

Unpaid volunteers such as Jaskolski are "employees of the government" as long as the government directs the details of that volunteer's performance. In this case, it is undisputed the government did so and thus Jaskolski was an "employee of the government" regardless of whether he was on the government payroll.

B. The government had the authority to control Jaskolski.

Having conceded that it directed the details of Jaskolski's every move in the investigation and prosecution of the Daniels, the government is left with the specious suggestion that it had no "authority to do so. The government's nonsensical contention is directly contrary to the facts and law.

1. The government has exclusive authority to investigate and prosecute federal crimes and thus had the inherent and exclusive authority to control Jaskolski.

The government's attempt to distance itself from Jaskolski by suggesting it had no authority to control him is frivolous. The government has the *exclusive* authority to control all activities in the investigation and prosecution of federal crimes and therefore necessarily had the inherent and exclusive authority to control anything Jaskolski did on the Daniels case. In other words, it was impossible for Jaskolski to have acted outside the control of the government

because he was doing things only the government could do.

The Constitution vests the power of enforcing the criminal laws of the United States in the Executive Branch, not in private citizens or corporations. U.S. Const., Art. II, Sec. 3. The Attorney General of the United States is the President's surrogate "in the prosecution of all offenses against the United States." *Smith v. United States,* 375 F.2d 243, 246-47 (5th Cir. 1967). And Congress implemented the President's enumerated Constitutional power by conferring the duty to institute federal prosecution upon, in this case, the United States Attorney for the Northern District of Indiana. 28 U.S.C. 507.

Like the U.S. Attorney's Office, the F.B.I. is part of the Department of Justice. 28 U.S.C. 531. It is comprised of persons whom the Attorney General has appointed "to detect and prosecute crimes against the United States." 28 U.S.C. 533.

It is therefore undisputed in this case that after April 1, 1999, Jaskolski was doing things that only the government could do: investigating and prosecuting federal crimes. Jaskolski had no authority of his own to interrogate witnesses to a federal crime. Likewise, Jaskolski had no authority of his own to handle witnesses or documents before a grand jury. Jaskolski had no authority of his own to handle witnesses or documents at a criminal trial in the district court. Jaskolski could do all of these things only at the request of and pursuant to the authority

of the government. Therefore, the government necessarily had the inherent and exclusive authority to control Jaskolski's involvement in the Daniels case.

2. *The government and Jaskolski agreed he was obligated to obey the government while working on the Daniels case and thus the government had the "authority" to direct the details of his performance.*

As demonstrated, the Constitution and federal law established the government had the inherent and exclusive authority to control Jaskolski's involvement in the Daniels case. But there is more: the undisputed facts in this case also established that the government had the authority to control every detail of his involvement in the investigation and prosecution of the Daniels.

First, there is direct, undisputed evidence that the government had the authority to control the details of Jaskolski's work. Jaskolski so testified in numerous ways, including, "I was under the control of the U.S. Attorney and the F.B.I." and "I did not and could not exercise any independent judgment of my own with regard to any aspect" of the Daniels case. (Jaskolski aff., par. 10, Jaskolski dep., p. 105.)

In addition, it is undisputed Agent Campbell and AUSA Butler, pursuant to their authority under 28 CFR 0.138, requested Jaskolski to assist in the grand jury investigation and later the trial, and thereby consented to his participation. It is also undisputed

the government and Jaskolski agreed upfront *before*[1] the investigation even began that Jaskolski would obey the directions of Agent Campbell and AUSA Butler *and* the terms of the Rule 6(e) certification *as well as* all policies, procedures, rules, regulations and laws of the federal government. (Jaskolski aff., par. 5; Jaskolski dep., p. 107.) Therefore, by their mutual agreement, the government had the authority to control the details of Jaskolski's work on the Daniels case.

Indeed, Jaskolski's agreement to obey the directions of the government was a necessary *precondition* to his participation in the Daniels case. As a necessary prerequisite to his participation, the government had Jaskolski sign the Rule 6(e) certification. Pursuant to the Rule 6(e) certification, the government consented to Jaskolski assisting "an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." (Exhibit G, Rule 6(e) certification.) Jaskolski and the government agreed that his activities could serve to assist the

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[1] Even if the parties had not agreed beforehand, both orally and in writing, that the government would control the details of Jaskolski's work on the Daniels case, that the government actually directed the details of Jaskolski's participation in the investigation and prosecution of the Daniels *as it occurred* and Jaskolski obeyed those directions established the government had the authority to control the details of Jaskolski's work. Restatement (Second) of Agency Section 7, comments a, b; Section 15, comments a, b; Section 26, comments a, b, c. Actions manifest consent as much as words.

federal government in enforcing federal criminal law and no other purpose. (*Id.*)

The U.S. Attorney then filed the 6(e) certification and notice of Jaskolski's involvement in the Daniels case with the district court pursuant to Rule 6(e)(3)(B). (Exhibit E, August 31, 2004 order, pp. 2-3.) Therefore, the U.S. Attorney itself declared to the district court that Jaskolski was acting on behalf of the government *and that he was acting subject to its control.*

Furthermore, Jaskolski's consent to obey was a promise the government could enforce. If Jaskolski did not do exactly as he was told at all times, he could no longer participate in the investigation and prosecution of the Daniels. (Jaskolski aff., par. 19.) Moreover, if Jaskolski disobeyed the terms of the Rule 6(e) certification, he would be subject to a finding of contempt and imprisonment. (Exhibit G, Rule 6(e) certification.) If he disobeyed either Agent Campbell or AUSA Butler at any point during the investigation and prosecution of the Daniels, he would subject himself to prosecution for interference with a federal criminal investigation.

For example, one of the central claims raised by the Daniels relates to Jaskolski's role in the initial interview of Rick Daniels. Agent Campbell directed Jaskolski to accompany him to the interview and Agent Campbell was physically present to supervise and direct any participation by Jaskolski in the questioning. Jaskolski testified he obeyed and followed the

government's lead at this interview. Is the government seriously suggesting Jaskolski – either on his own initiative or at the direction of another NICB employee – could have ignored any directions of Agent Campbell and proceeded to subject Daniels to waterboarding in order to extract a confession? Is the government seriously suggesting Agent Campbell would have been powerless to prevent Jaskolski from doing so? Nonsense! The government obviously had the authority to control Jaskolski during the interview and had the ability to make sure Jaskolski obeyed its orders.

Consequently, the government had the authority to direct – and in fact directed – the details of Jaskolski's performance. Therefore, Jaskolski was an "employee of the government."

C. The authority to "control" is based on consent, not coercion.

The government cannot avoid the conclusion that it had the authority to control the details of Jaskolski's activities in the Daniels case, so it disingenuously attempts to add another element to the "employer-employee" test. The government frivolously suggests that, for it to be Jaskolski's employer, it had to have the right to "coerce" or "compel" Jaskolski to act against his will. (Apparently, the government believes the threat of contempt or prosecution for interference was not enough to "compel" Jaskolski to obey.) The government's contention demonstrates a

profound misunderstanding of the employment relationship. That relationship is based on consent, not coercion or force. No case law or authority has ever suggested an employer has the right to compel or coerce an employee to do anything against his will.

As the government's specious contention demonstrates, the use of the term "control" in defining the employment relationship requires further explanation. Indeed, the use of the term "control" is unfortunate. People are neither puppets nor, since passage of the 13th Amendment, slaves. American jurisprudence does not recognize the right of any human being to *control* another human being, particularly in the sense of the "master" being able to coerce or compel the "servant" to act against his will.

Indeed, *no* legal authority has *ever* suggested that the ability to "coerce" another is a required element of the "master-servant" or employment relationship. To the contrary, the law makes it clear that the employment relationship is based entirely on consent, not coercion or force.

The Restatement (Second) of Agency[2] defines agency as a "relation which results from the *manifestation of*

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[2] The Restatement (Second) of Agency is a particularly valuable source in further defining "employee" as necessary. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 1348 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31, 109 S.Ct. 2166 (1989); *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n.15 (7th Cir. 1998). A caveat: where, as here, the statutory

(Continued on following page)

consent by one person to another that the other shall act on his behalf and subject to his control, and *consent* by the other so to act." Restatement, § 1. Comment a of Section 1 further states, "the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other *consents* so to act." Section 32 of the Restatement further clarifies that the agency relationship is "consensual." Sections 7, 15, 26, 32, 43 and 221 of the Restatement also further illustrate how the master's authority to control, and the servant's authority to act on behalf of the master, is created by the parties' manifestation of *consent.*

Section 220 of the Restatement provides that a "servant" is defined in part by "the extent of control which, *by the agreement,* the master may exercise over the details of the work," Section 220, comment h, further defines this factor as "*an agreement* for close supervision or *de facto* close supervision of the servant's work."

In other words, there is a "master-servant" or employment relationship if one party (the master) requests that another party (the servant) act on the master's behalf and subject to his direction and the

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definition of "employee" rules out consideration of certain aspects of the common law definition – such as whether the government paid the employee – then the statutory definition controls.

servant *agrees* to do so. It is *the agreement or consent between the parties* that both grants and defines the master's authority to direct the details of performance.

Therefore, by definition, no employer has the right to coerce an employee to act against his or her will. Indeed, it would be against public policy to even suggest that an employer may coerce an employee as this would return us to the days of slavery. The right to coerce is not an element of the employment relationship and Jaskolski need not prove the government had the ability to coerce him to act against his will in order to be an "employee of the government."

D. Jaskolski was an "employee of the government" for purposes of the Daniels case.

The government's next assertion that Jaskolski purportedly could not be an "employee of the government" because he may have been working in a very limited fashion on other NICB files during the Daniels case is also without merit. No one is limited to one employer. The question here is whether Jaskolski was an "employee of the government" for purposes of his work on the Daniels case, not whether he was an NICB employee for hypothetical work on unrelated matters.

First, the Westfall Act's definition of "employee" includes those persons who are only temporarily employed. 28 U.S.C. 2671. As demonstrated by the

airplane pilot in *United States v. Becker,* 378 F.2d 319 (9th Cir. 1967) who worked only on a sporadic basis, "temporary" does not mean "continuous."

Furthermore, as held in *Ezekiel v. Michel,* 66 F.3d 894, 903 n.16 (7th Cir. 1995), the determinative fact is not whether Jaskolski may have been employed by the NICB on other matters but that Jaskolski was under the supervision and control of the FBI and U.S. Attorney's office – and thus loaned to the government – for all of his activities related to the government's investigation and prosecution of the Daniels. Indeed, Jaskolski's being loaned to the federal government by a private entity such as NICB is the very situation the Supreme Court acknowledged the definition of "employee" was intended to cover. *Logue v. United States,* 412 U.S. 521, 531, 93 S.Ct. 2215, 2221 (1973).

As the Seventh Circuit held in *Ezekiel,* under the borrowed servant doctrine, an employee of one employer (NICB) can nevertheless be the employee of another employer (the United States) for purposes of determining which of the two employers is liable for allegedly tortious conduct. 66 F.3d at 903 n.16. The Restatement further notes that, "If . . . the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee *as to such act* becomes a servant of the temporary employer." Restatement (Second) of Agency §227, comment d.

For example, in *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 28, 48 S.Ct. 241 (1928),[3] the Supreme Court considered whether an employee of the "Big Four" railroad was an "employee" (or loaned servant) of the Chesapeake & Ohio railroad at the time of his death. To facilitate the interchange of rail traffic, the two railroads had arranged for Big Four crews to operate Big Four locomotive and cabooses pulling freight cars over C & O tracks and vice-versa. While on C & O tracks, the Big Four train crew was under the supervision and control of the C & O trainmaster and had to obey the signals of C & O switch tenders and comply with C & O's rules for operation.

In ruling that the Big Four crews were "employees" of C & O at the time of the plaintiff's death and thus that C & O was liable, the Supreme Court considered only who had the power to control and direct the servants in the performance of their work at the time of injury. That the Big Four railroad alone had decided the crew would work on C & O tracks on that particular day was irrelevant. Likewise, it was irrelevant that the Big Four and not C & O had the right to discharge or suspend the crew. The determinative factor was that the Big Four had no ability to prevent the accident whereas the C & O did

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[3] *Linstead* was decided under FELA, which, like the FTCA, incorporates common law "master-servant" doctrine to define "employee."

because it controlled the details of the crew's performance.

Similarly, in *United States v. Becker,* 378 F.2d 319 (9th Cir. 1967), the court held that the pilot was a borrowed employee of the government for purposes of the forest fire reconnaissance flights even though he also flew the same plane as an independent contractor for other entities as well. See also *Martarano v. United States,* 231 F.Supp. 805, 808 (D. Nev. 1964) (employee of Nevada was loaned to the federal agency for federal service).

In this case, the Daniels seek to hold Jaskolski liable for the acts he committed at the government's direction on their case, not his hypothetical work on another NICB file. Therefore, as the cited cases demonstrate, the question is not whether Jaskolski hypothetically could have been directed by NICB to do something else with his time. Rather, the real question is, under the terms of the working relationship between the government and Jaskolski, did the government direct the detailed performance of Jaskolski's work *on the Daniels case itself.* The government concedes it did.

The government's related contention that only NICB could decide whether Jaskolski worked on the Daniels case is conceptually and factually wrong. As the government itself concedes, the government had to initially invite Jaskolski to participate in the Daniels case; NICB could not direct the government to accept Jaskolski's assistance. And as the govern-

ment also concedes, it could have stopped Jaskolski from participating in the Daniels case at any moment. NICB could not have countermanded the government's direction. So the government alone determined whether Jaskolski worked on the Daniels' case.

Thus, it is clear that while Jaskolski assisted in the government's investigation and prosecution of the Daniels, he was under the complete control of the government through its employees. Consequently, under *Ezekiel* and the borrowed servant doctrine, Jaskolski is considered an employee of the FBI or U.S. Attorney and thus the United States government. *Costa v. United States,* 845 F.Supp. 64, 69 (D. R.I. 1994).

E. The Daniels seek to impose liability against Jaskolski for those actions directed and supervised by the government.

The government next asserts that the Daniels' claims may include some conduct by Jaskolski before he went to the FBI on April 1, 1999, but this contention is both misleading and immaterial. The United States still must be substituted as a defendant for all claims because every claim is based on conduct taken by Jaskolski under the government's direction.

First, the government does not properly characterize the Daniels' complaint. The counts directed against Jaskolski allege that he acted in a conspiracy with the United States, acted as a "special agent" of the United States, or otherwise assisted the United States in knowingly and wrongfully prosecuting the Daniels without grounds. Furthermore, as demonstrated by the complaint and the Daniels' response to the parties' motions for summary judgment, all of the counts pled against Jaskolski are based on Jaskolski's conduct *after* the government began its investigation of the Daniels. (Exhibit K, Plaintiffs' Response to Motion for Summary Judgment, pp. 18-19, 21, 23, 25, 27, 31, 32, 34, 36, 40.)

Furthermore, even if there were limited allegations regarding Jaskolski's conduct before the government's investigation began on April 1, 1999, that would not get the government off the hook. The Westfall Act speaks of certification not of "the claim" but of "the incident out of which the claim arose." Where a single claim involves multiple acts or events, certification is properly done at the level of individual acts or events rather than the entire case viewed as a whole. *Lyons v. Brown,* 158 F.3d 605, 607-09 (1st Cir. 1998). See also *Ferguson v. United States,* 712 F.Supp. 775, 780-81 (N.D. Cal. 1989) (contractor could be agent or "employee" for specified circumstances while also serving as independent contractor for other circumstances). It is undisputed that the government began its investigation of the Daniels on April 1, 1999 and that all of Jaskolski's involvement after that date

was subject to the supervision and direction of the United States. Therefore, Jaskolski should be certified as an "employee of the government" for all conduct from April 1, 1999.

F. Jaskolski served the government's interests.

The government's next suggestion that Jaskolski could not have been an "employee of the government" because his work for the government purportedly served NICB's interests is legally and factually without merit. Whose interest was served is entirely irrelevant to the determinative question of who controlled the details of Jaskolski's work. In any event, Jaskolski's work on the Daniels case served the government's interests, not NICB's.

It is legally irrelevant whether Jaskolski's work for the government may have incidentally served the interests of NICB. In *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 28, 48 S.Ct. 241 (1928), already discussed above, the Supreme Court, in ruling that the Big Four crews were "special employees" of C & O at the time of the plaintiff's death, considered only who had the power to control and direct the servants in the performance of their work at the time of injury. That the Big Four crews' work at the time of the injury was also serving Big Four's interests – the freight train was being transferred to Big Four tracks – was not even considered. The proposition that the government could not be Jaskolski's employer merely

because its interests allegedly were not the only ones being served by Jaskolski's performance is without merit or support in the law.

And there can be no dispute that Jaskolski's work on the Daniels case after April 1, 1999 served the *government's* interests. As demonstrated above, it is solely within the province of the Department of Justice to investigate and prosecute federal crimes and Jaskolski's work helped fulfill that purpose. NICB had no independent authority or ability of its own to participate alongside the government, nor did it have any interest in doing so as its purpose of facilitating the investigation of insurance fraud was already fulfilled on April 1, 1999 when the government opened its own investigation. Therefore, Jaskolski was performing *only the government's work*, not NICB's. Consequently, the only direct beneficiary of Jaskolski's work was the government.

The determinative fact remains that the government directed the details of Jaskolski's work on the Daniels case. Its contention regarding whose interest was served is irrelevant and without merit. Jaskolski was an "employee of the government" under the Westfall Act.

3. <u>As goes Jaskolski, so goes NICB.</u>

The government cannot avoid certifying Jaskolski as an "employee of the government" and consequently NICB is entitled to the same benefit of

immunity as Jaskolski. This is true as a matter of common law, regardless of whether NICB itself can be an "employee" under the Westfall Act.

The Daniels' complaint against NICB is based solely on *respondeat superior*. It is undisputed that no one at NICB other than Jaskolski had any involvement whatsoever after the government began its investigation on April 1, 1999. It is also undisputed that Jaskolski did not report to NICB regarding the government's investigation. Finally, it is undisputed that no one at NICB supervised or directed Jaskolski during the government's investigation.

Under Indiana law, where Jaskolski is immune, his employer NICB cannot be held liable under *respondeat superior* either. *Riffle v. Knecht Excavating, Inc.*, 647 N.E.2d 334 337-38 (Ind.Ct.App. 1995). Whatever immunity Jaskolski is granted under federal law thus automatically extends to NICB.

CONCLUSION

Wherefore, for the reasons set forth above, the Defendants Joseph Jaskolski and National Insurance Crime Bureau respectfully pray that this Honorable Court certify that Jaskolski was an "employee of

the government" pursuant to 28 U.S.C. 2671 and 2679(d)(3) for his work on the Daniels case.

Respectfully submitted,

BULLARO & CARTON, P.C.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

Joseph Jaskolski, Individually, and the National Insurance Crime Bureau,	)	
Petitioners,	)	
vs.	)	
Alberto R. Gonzales, Attorney General Of the United States of America, Joseph S. Van Bokkelen, United States Attorney for the Northern District Of Indiana, and The United States of America,	)	2:06cv213
Respondents.	)	

AFFIDAVIT

1. I have personal knowledge of the information contained in this Affidavit. I am an adult of sound mind and would be competent to testify to same at trial.

2. On April 1, 1999, I met in person with Special Agent Timothy Campbell of the Federal Bureau of Investigation to discuss the insurance claim submitted by Kenneth Daniels to Liberty Mutual Insurance Company.

3. At that meeting, Agent Campbell decided to request that the United States Attorney's office open a criminal investigation into the Kenneth Daniels claim.

4. At the same meeting on April 1, 1999, Agent Campbell also asked me to assist in the investigation.

5. It was always clear between me and the FBI Agents and United States Attorneys – based upon numerous conversations with such government employees, numerous documents provided to and/or signed by me, including several Rule 6(e) certifications, and years of my involvement in numerous governmental investigations at the government's request, that any assistance I provided would be subject to and controlled by the terms of the Rule 6(e) certifications I had previously signed, as well as any and all policies, procedures, rules and regulations and laws of the federal government. In other words, I was subject to the exact same rules as the FBI agents and United States Attorneys. In addition, based on those same conversations, documents and several years' worth of assisting the government in investigations at its request, by agreeing to the government's request to assist, I was also agreeing to match my schedule to the government's needs.

6. The Rule 6(e) certification precludes me from discussing certain details of the investigation. It is, and always has been, my intent to fully comply with my obligations under Rule 6(e), and I set forth below only that information which I believe in good faith falls outside the confidentiality requirements of Rule 6(e).

7. In general terms, I assisted only in the following areas:

a. Accompanied Agent Campbell on interviews of witnesses;

b. Accompanied Agent Campbell on site or other inspections;

c. Assisted in reviewing documents as directed;

d. Assisted in escorting of witnesses at grand jury proceedings;

e. Assisted United States Attorney Clarence Butler at trial.

8. With regard to all of these activities, I did only what I was told to do by either Agent Campbell or AUSA Butler, or other FBI agents and U.S. Attorneys. (For the sake of simplicity, I will refer only to Agent Campbell or AUSA Butler hereafter but my intent is to include any other FBI agents or U.S. Attorneys who may have been involved in the case as well.)

9. I always acted under the direct supervision and control of either Agent Campbell or AUSA Butler. Agent Campbell or AUSA Butler alone always decided what particular result to achieve and they alone decided also to achieve that result in a particular way at a particular location at a particular time with particular documents or persons. I always complied with their requests to perform a task according to a certain schedule.

10. I did not and could not exercise any independent judgment of my own with regard to any aspect of the investigation, indictment or prosecution of the Daniels. There were no legal or professional considerations that would have allowed me to

disregard the control or directions of Agent Campbell or AUSA Butler.

11. Specifically, either Agent Campbell or AUSA Butler decided who to interview, and when and where to interview the witnesses. I could not, and did not, ever decide on my own initiative to interview any person or witness. I could not, and did not, see or interview any witnesses in any other place or under any other circumstances other than as directed by either Agent Campbell or AUSA Butler. I could not, and did not, see or interview any witnesses on my own; I only accompanied Agent Campbell or AUSA Butler and either one of them was always physically present and directly supervising or directing me. During these interviews, I was subject to the same policies, procedures, rules and laws to which Agent Campbell or AUSA Butler was bound. I always followed their lead and direction during the interviews.

12. Likewise, Agent Campbell or AUSA Butler decided what documents to subpoena or otherwise obtain, as well as what inspections to conduct. Agent Campbell or AUSA Butler always decided the purpose for any inspection or document review. Agent Campbell or AUSA Butler told me what information they were looking for and I complied with this direction during the document review or inspection. I did not, and could not, conduct any inspection or obtain or review any documents other than as directed by either Agent Campbell or AUSA Butler. I never conducted any, inspection on my own; I only accompanied Agent Campbell or AUSA Butler and either one of them

was always physically present and directly supervising and directing me during the inspection.

13. During grand jury proceedings, while AUSA Butler presented witnesses to the grand jury, I assisted Agent Campbell in making sure other witnesses appeared and that the witnesses were kept separate. I was always physically accompanied and directed and supervised by Agent Campbell or AUSA Butler during these proceedings and I did only what I was told by them to do.

14. I also attended the trial only to assist Agent Campbell or AUSA Butler at their request and according to their directions. For example, I responded to their requests for documents or other information obtained during the investigation or grand jury proceedings. I did not do anything on my own initiative at the trial and I was always directly supervised and controlled by either Agent Campbell or AUSA Butler.

15. From April 1, 1999 to the end of the Daniels' trial, no employee of NICB ever had any involvement whatsoever with the investigation or prosecution of the Daniels, with the sole exception that an employee of NICB prepared – according to the directions of AUSA Butler – a chart used at trial.

16. From April 1, 1999 to the end of the Daniels' trial, I was bound by the terms of the Rule 6(e) certification and consequently, I could not, and I did not, report to anyone at NICB any information whatsoever regarding the investigation or prosecution of the Daniels other than to inform

them of the general fact that I was involved in the investigation.

17. No one else at NICB was certified under Rule 6(e) and consequently, NICB could not and did not exercise directly or indirectly any influence, control or review over my involvement in the investigation and prosecution of the Daniels. For the same reason, no one at NICB did or could give me any direction as to witness interviews, document review, inspections, or the grand jury proceedings or trial.

18. No one at NICB had the right or authority to allow me to perform any task related to the Daniels investigation, grand jury proceedings and trial. To the contrary, Agent Campbell and AUSA Butler (and other government employees) were the only ones who could allow me to be involved in the 'investigation and prosecution of the Daniels. That Agent Campbell and AUSA Butler had such right and authority is demonstrated by the fact that they (and other government employees) repeatedly requested my assistance in numerous governmental investigations and prosecutions over many years and that both their superiors in the United States Attorney's office and the federal judges in Indiana were aware of and acquiesced in my involvement, without exception.

19. Agent Campbell and AUSA Butler had the sole right and authority to terminate my participation in the investigation and prosecution of the Daniels and could have exercised that right at any time for any reason. In addition, even if I had

not remained an employee of NICB, Agent Campbell and AUSA Butler could have allowed me to continue to participate (under their detailed direction and supervision) in the investigation and prosecution of the Daniels.

I declare and certify, under penalty of perjury, that the foregoing is true and correct. Executed on February 14th, 2008.

/s/ Joseph Jaskolski
Joseph Jaskolski

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE LAKE SUPERIOR COURT
ROOM NUMBER FIVE
SITTING IN HAMMOND, INDIANA

KENNETH DANIELS and SHARON DANIELS.	)	
Plaintiffs	)	
VS	)	
LIBERTY MUTUAL INSURANCE COMPANY, VEHICLE INVESTIGATIONS, NATIONWIDE, INC., and AMERICAN INSTITUTE OF TECHNOLOGY, INC.,	)	CAUSE NO. 45D05-9910-CP-1828
Defendants	)	

The deposition of JOSEPH J. JASKOLSKI, JR., taken at the instance of the Plaintiffs herein, pursuant to notice as to time and place and pursuant to the Statutes of the State of Indiana, before Darla R. Allen, CSR-RPR, a Notary Public for the State of Indiana, at 202 Joliet Street, Suite 2-A, Dyer, Indiana, on Wednesday, the 6th day of August, A.D., 2003, commencing at the hour of 1:45 o'clock in the afternoon.

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Also Present: Kenneth Daniels
Ricky Daniels

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DEPOSITION OF: JOSEPH J. JASKOLSKI, JR.

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[99] investigation.

MR. BULLARO: I think he wants to know when it was brought to the attention of the F.B.I.

THE WITNESS: Very shortly. I think three, four weeks after I went from referral to a case.

BY MR. VANZO: (Continuing)

Q. So three or four weeks after a case – you opened the case file, you had – you made some referral to the F.B.I.; is that what you're saying?

A. Well, first I had to get the case file which may have took a week or two. I don't know how long. Once I got the case file, saw the inconsistency from the statements, I immediately took it over to the F.B.I. White Collar Crime Unit for additional investigation.

Q. Okay. At some point, whether it's three or four weeks or whatever it was –

A. It was three, four weeks.

Q. – you contacted the F.B.I.; is that right?

A. That's correct.

Q. Before you contacted the F.B.I., did your decision to contact the F.B.I. need to be discussed with anybody else at NICB?

A. No.

Q. Was it, in this case, discussed with anybody at NICB before you contacted the F.B.I.?

[100] A. No.

Q. Now in that period, that was three weeks or four weeks, from whatever it was, from the time you opened the case file until you contacted the F.B.I., you had received the investigation of the claims file on this fire loss; right?

A. Correct.

Q. Had you already received the claims files on the other losses for the people cited?

A. No.

Q. What else had you done in your investigation besides receiving the Liberty Mutual claim file before making contact with the F.B.I.?

A. Virtually that's all I needed. I sent in requests for the other files but based on the Liberty Mutual referral and information contained in that claim file, I went to the F.B.I. That is our duty. That's what we do.

Q. And I don't – and I'm certain that you told me everything but you said virtually. I just want to make sure I understand.

Are you saying that you did nothing else except review that claims file and make requests for those additional claim files?

A. And the research. That it was additional – yes, all

* * *

[105] Q. Did your investigation of this matter continue beyond that first meeting with the F.B.I.?

A. After that first meeting with the F.B.I. I was under the control of the U.S. Attorney and the F.B.I. My investigation stemmed from their order and their direction.

Q. Okay. Just so I understand this: Did any investigation you conducted after the first meeting with the F.B.I. was not performed solely on behalf of the F.B.I. but was performed in conjunction with the F.B.I.?

MR. BULLARO: Just a point of order. When you say solely, I don't know if it would be a foundation objection because I really don't know what

the answer is myself as to whether or not the NICB is still involved.

MR. VANZO: Okay. Well, let's back up a little bit then.

BY MR. VANZO: (Continuing).

Q. What happened at that first meeting besides – tell me everything that happened at this first meeting with the F.B.I.

MR. BULLARO: Other than what he just told you?

MR. VANZO: Yeah.

MR. BULLARO: I don't know.

* * *

[140] him what was said.

MR. VANZO: Okay. What was said. I presume to ask him about what it was about from his perspective. He ought to have some feeling about what the meeting was about.

BY MR. VANZO: (Continuing)

Q. What did you think the meeting was about?

A. Additional harassment.

Q. Something other than what was mentioned the first time?

A. Yes.

Q. Who called this meeting?

A. What do you mean who called this meeting?

Q. Well, how did you know to go to a meeting?

A. Tim Campbell instructed me to come.

Q. Do you know whether Tom Saswa requested to meet with you?

A. With me or us?

Q. Well, with you specifically.

A. I don't know.

Q. And what additional harassment was discussed at that meeting?

A. I think another member of the Hammond Police Department was at the tow lot or Saswa's place of business, talking about what he should or shouldn't

* * *

[228] but he ate, he didn't golf. So he was there. That's about it.

Q. Tell me about that, which steak fry?

A. F.B.I. steak fry.

Q. When do they have that?

A. Once a year.

Q. And you're invited to it?

A. Yes.

Q. Do you go every year?

A. Yes.

Q. And where is it held at?

A. LaPorte, Indiana.

Q. Is this something that you have to purchase tickets to or you're just invited?

A. Purchase tickets to.

Q. Okay. And NICB purchases tickets?

A. No, I do.

Q. Personally?

A. Yes.

Q. And did you go by yourself or did you take other people?

A. Which time and what relevance is this to that? I . . .

Q. During the time before you took the case to the F.B.I.

A. I went for the last couple of years, prior to every year.

[229] Q. Okay. And who sells you the tickets?

A. There's a list of attendees that attended the year prior and I think the clerks send out the invite from the F.B.I., the F.B.I. clerks.

Q. And how much are the tickets?

A. 60 bucks with lunch.

Q. Okay. And how many did you purchase?

A. One.

Q. Okay. Have you ever gone there with anybody other than yourself to purchase more than one ticket?

A. Which question do you want me to answer first?

Q. Had you ever gone there with anybody else?

A. Yes.

Q. And who had you gone there with?

A. Other members of our NICB league.

Q. Sort of a PR thing I take it?

A. Correct.

Q. And what other members of the NICB would go to the F.B.I. steak fry?

A. Vice President of Operations, regional manager, and that's about it.

Q. And what's the purpose of maintaining this sort of public relations thing with the F.B.I.?

A. Part of our job.

Q. Explain that to me.

* * *

[239] Ricky in the next couple of days. Let me know when you have free time.

Q. Was there a particular reason that you guys discussed about why Ricky? This was your first interview; right?

A. I would presume because he was driving the vehicle when it caught afire.

Q. Was this a joint idea between the two of you?

MR. BULLARO: Is what a joint idea?

MR. RUBINO: Deciding to go talk to Ricky first.

THE WITNESS: No. Campbell called me and says that we would go.

BY MR. RUBINO: (Continuing)

Q. Did either you or Campbell or anybody else from the NICB or the F.B.I. to your knowledge notify Ricky that you were going to interview or try to make an arrangement for an interview?

MR. BULLARO: I'm going to object to the extent to which it asks the witness to testify as to what others may have done.

MR. RUBINO: You can answer my question.

THE WITNESS: Nobody at the NICB did that.

BY MR. RUBINO: (Continuing)

Q. To your knowledge did anybody from the F.B.I.?

A. I don't know what the F.B.I. did prior to my arriving

* * *

[258] mind of another party.

MR. RUBINO: You can answer.

THE WITNESS: I would speculate that there was not another F.B.I. agent available to witness whatever he was going to do.

BY MR. RUBINO: (Continuing)

Q. Okay. So you were serving as a witness to Campbell's activities as far as you knew?

A. I don't know that for a fact.

Q. Did you have – from your interaction with Campbell, did you have a higher expertise or experience level in insurance fraud than he did?

MR. BULLARD: Objection. Again calls for speculation on the part of his mind, lack of foundation as well.

MR. RUBINO: You can answer.

THE WITNESS: I don't know.

BY MR. RUBINO: (Continuing)

Q. During your interaction with him, were you the – sort of the – the guy sort of calling the direction on how to proceed or was he?

A. I was not.

Q. That was a joint effort?

A. No. Guidance was given from the U.S. Attorney's office to Campbell. I had no participation in how to [259] pursue.

Q. I'm talking about before the U.S. Attorney. Were you giving Campbell guidance based on your experience and expertise in insurance fraud?

A. No.

Q. Do you know what experience Campbell had with insurance fraud cases?

A. I know Campbell was an attorney, but as far as his experience in insurance fraud, I don't know.

Q. So you did not offer or volunteer any of your vast experience and knowledge in the insurance fraud area?

A. Just gathered the information and presented it to him.

MR. RUBINO: Okay. That's all I have.

CROSS EXAMINATION

BY MR. FINN:

Q. Did anyone from Liberty Mutual direct you how to conduct your activity?

A. No.

Q: Did you consult with anyone from Liberty Mutual Insurance Company regarding how to conduct your activity?

A. No.

Q. Did you ask – did Liberty Mutual specifically ask you to open up a case file?

A. No.

* * *

All persons (including all agents, supervisors, technicians and support staff) who have or will have access to Federal Grand Jury material arising out of current Federal Grand Jury investigations in either the Northern or Southern Districts of Indiana *must read and complete this form* and immediately forward signed copies to the appropriate United States Attorney's office. The second and third copies are for the employee and the agency files respectively.

* * *

To: /s/ Joseph Jaskolski

From: United States Attorney
Northern District of Indiana
1001 Main Street, Suite A
Dyer, Indiana 46311

Your agency has assigned you to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. As such you will be given access to materials, including documentary and testimonial evidence, obtained through the powers of one or more Federal Grand Juries in these and other judicial districts inquiring into possible federal criminal violations.

In accordance with Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, you are being given access to those materials for the sole purpose of assisting the Government attorneys involved in the Federal Grand Jury investigations in the performance of their duties to enforce federal criminal law.

A Federal Grand Jury investigation is criminal in nature, and grand jury proceedings are secret. *The unauthorized disclosure of grand jury matters is punishable as a contempt of court.* Grand jury matters may include the identities of witnesses, their testimony and the nature and content of documents and physical evidence obtained through the grand jury investigation.

No grand jury material may be disclosed or used for any civil or administrative purpose or for any purpose other than for the grand jury investigation, except by order of the Court.

The pertinent portions of Rule 6(e) of the Federal Rules of Criminal Procedure are printed on the back of this document.

CERTIFICATION

I hereby certify that I have been fully advised and understand the Federal Grand Jury Secrecy Requirements imposed by Rule 6(e) of the Federal Rules of Criminal Procedure and that a knowing violation of Rule 6(e) may be punished as a contempt of court.

DATED: 8-24-98 /s/ Joseph J. Jaskolski
(Signature)

Please *print or type* the following information for the disclosure and certification notice filed with the Court.

Name:	Joseph J. Jaskolski
Title or Position:	Sr. Special Agent
Agency:	National Insurance Crime Bureau
Duty Station:	Merrillville, IN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JOSEPH JASKOLSKI, ET. AL.,	)	
PLAINTIFFS	)	
V.	)	2:03 CV 479 RL
RICK DANIELS, ET. AL.,	)	
DEFENDANTS	)	

Memorandum by the United States
Pursuant to Court's Order of August 23, 2004

Joseph Jaskolski was (and is currently) an investigator with the National Insurance Crime Bureau (NICB). The NICB is a not-for-profit organization that receives support from insurance companies to investigate and detect instances of insurance fraud. For many years, Jaskolski has worked with the FBI and the United States Attorney's Office on a number of insurance fraud investigations and indictments. In connection with that work, Jaskolski has been given access to certain grand jury material and the United States Attorney's Office has filed the necessary notice with this court pursuant to Rule 6(e)(3)(B).

Jaskolski worked with the FBI and United States Attorney's Office on the grand jury investigation involving Rick and Kenneth Daniels. In that capacity, Jaskolski was given access to grand jury material.

Jaskolski was given grand jury access pursuant to Rule 6(e)(3)(A)(ii). That rule covers "government personnel." While Jaskolski is not employed by any government agency, his actions here were at the direction of the FBI and/or the United States Attorney's office.

Rule 6(e)(3)(A)(ii) is self-executing in that no court order is required for such disclosure. The United States Attorney's Office advises those to whom disclosure is made of their secrecy obligations and files a certification with the court pursuant to Rule 6(e)(3)(B).

The actions by the United States Attorney's Office here (or on any matter involving the grand jury) are reviewable by this court. The government acknowledges its actions in treating Jaskolski as "government personnel" may not have been correct. If the government erred in making such a disclosure, that matter will be dealt with in subsequent proceedings by the court. For the present matter, the government believes that the issue is that Jaskolski obtained some grand jury information and that Rule 6(e) requires it to be protected unless ordered otherwise by this court. As the courts have repeatedly emphasized, the public interest in grand jury secrecy and the public interest in the sanctity of the grand jury is strong. *In Re Special September 1986 Grand Jury*, 942 F.2d 1195, 1198 (7th Cir. 1991).

The state plaintiffs, defendants in this action (hereinafter "the Daniels") rely on *United States v.*

Tager, 638 F.2d 167 (10th Cir. 1980), for the proposition that Rule 6(e) does not control here. In *Tager*, the government disclosed grand jury material to an insurance investigator. This disclosure was not pursuant to Rule 6(e)(3)(A)(ii), but rather pursuant to a district court order sought and obtained by the government pursuant to Rule 6(e)(3)(C)(i) [now renumbered as 6(e)(3)(E)(i)]. Subsection (E)(i) authorizes disclosure pursuant to court order "preliminarily to or in connection with a judicial proceeding." The Tenth Circuit, in a 2-1 decision, concluded that the district court had no authority to issue the disclosure order because a grand jury proceeding was not a "judicial proceeding" contemplated by Rule 6(e)(3)(C)(i).

That is the extent of the holding in *Tager*.[1] *Tager* did not decide the issue presented here, *i.e.* whether grand jury information disclosed to an insurance investigator should be controlled by Rule 6(e) for purposes of a state discovery proceeding. Indeed, *Tager* noted that the disclosure therein was "therefore controlled by Rule 6(e)," suggesting, at least, that had the *Tager* court been dealing with a discovery issue as

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[1] The Seventh Circuit reached the opposite result in *United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978).

Tager has also been eroded by a later decision in the 10th Circuit, *United States v,* [sic] *Anderson*, 778 F.2d 602 (10th Cir. 1985). *See also, United States v. Benjamin*, 852 F.2d 413, 419 (9th Cir. 1988) (questioning whether Tager has any remaining "vitality").

presented here it would have employed Rule 6(e). *Id.* at 169.

The Daniels also cite Rule 6(e)(2)(A) which states that "no obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." That subsection covers persons who are not connected in any way to the grand jury process. A private citizen, for example, who testifies before a grand jury about what he saw is certainly free to discuss his testimony with anyone. Persons connected to the process, however, are in a different category altogether.

Jaskolski was given access to grand jury material pursuant to Rule 6(e)(3)(A)(ii). Accordingly, he becomes a person closely associated with the grand jury process and he cannot therefore disclose "matters occurring" absent a court order. Rule 6(e)(2)(B)(vii).

Even assuming that the government erred and Jaskolski should not have been given access, the government submits that is not the end of the inquiry. There are still important grand jury secrecy interests to protect. Certainly those interests are not left unprotected because of a good-faith, yet arguably wrong, decision by the government. If so, it would be the conduct of the government alone that dictated the extent of the protection.

The Supreme Court has consistently recognized that "the proper functioning of our grand jury system depends on the secrecy of grand jury proceedings." *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211,

218 (1979). There are a number of important interests served by grand jury secrecy including the protection of witnesses, encouraging witnesses to come forward and testify fully, and protecting those who may be implicated in an investigation but never charged. Id at 218-19. Even where, as here, the grand jury has concluded its work, those interests remain. As *Douglas Oil* noted, the courts must not only consider the effects on a particular grand jury, "but also the possible effect upon the functioning of future grand juries." *Id.* at 222.

Assume the following scenario: government disclosed grand jury information to "Private Investigator Jones" who works with government on grand jury investigation into conduct of persons A, B and C.[2] Person A is indicted, but Persons B and C are not. If the government erred in its disclosure to Jones, does that mean Jones can be questioned freely in a state discovery proceeding about persons B and C? Surely, the important interests that B and C have are not dependent solely on the government's actions, but can and should be protected by the court. Countless similar scenarios could be developed implicating the other important interests protected by grand jury secrecy.

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[2] This is only a hypothetical example and the government is not suggesting that such events occurred (or did not occur) in the Daniels investigation.

The government respectfully submits any disclosures made to Jaskolski are protected under Rule 6(e). The issue then becomes, the procedure to be employed to protect the grand jury secrecy interests while balancing any legitimate need for information by any of the parties to the state litigation.

As referenced above, Rule 6(e)(3)(E)(i) allows the district court to authorize disclosure of grand jury matters "preliminarily to or in connection with a judicial proceeding." There is a large body of well-settled case law defining this procedure. A party seeking grand jury material for use in another proceeding[3] must show a "particularized need" for the material and that without the material the party would be greatly prejudiced in the other proceeding or that an injustice would be done. *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958); *Douglas Oil, supra* at 221-22.

The Seventh Circuit has repeatedly referenced Rule 6(e)(3)(E)(i) as the appropriate procedural vehicle for requesting disclosure of grand jury matters in post-criminal proceedings. The party seeking the information must apply to the district court where the grand jury was convened and demonstrate to that court its particularized need. *United States v. Campbell*, 294 F.3d 824, 827 (7th Cir. 2002). An important consideration in assessing

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[3] The government must follow this procedure as well if it seeks to utilize grand jury material in another proceeding.

whether to release grand jury information here is whether the party seeking the information has structured its request to "cover only material so needed." *Id.* at 827 n.1 (and cases cited therein).

As stated in the argument before this court on August 23rd, while the government has not been privy to all of the state discovery requests, it has viewed some of the requests and some of the questions propounded to Jaskolski at a deposition. The government is concerned that some of those requests (*See*, Jaskolski's Amended Motion for Preliminary Injunction Exhibits filed August 18, 2004: *e.g.* Exhibit F, paragraph 3, motion to produce all memos etc. between Jaskolski and the United States Attorney's Office and/or FBI exhibits; Exhibit D, questions propounded during deposition), may involve grand jury matters.

In addition, in preparing this response, the government reviewed the underlying state complaint alleging, *inter alia*, malicious prosecution by Jaskolski. Count 1, paragraph 5, of the state complaint alleges "defendants did not have probable cause to have instituted said criminal prosecution." This broad allegation suggests to the government that there will indeed be discovery efforts into the grand jury investigation. The grand jury determined probable cause and the United States Attorney's Office, in conjunction with that grand jury finding, filed the indictment pursuant to Criminal Rule 7. Jaskolski and the other state defendants did not make those determinations. These broad allegations

and subsequent discovery requests do not show a particularized need and do not meet the precise structuring ("only material so needed") required by the courts.

The government respectfully requests that the state discovery sought against Jaskolski be stayed until such time as the Daniels make the appropriate request pursuant to Rule 6(e)(3)(C)(i).

Respectfully submitted,

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UNITED-STATES ATTORNEY

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Certificate of Service

I hereby certified [sic] that August 25, 2004 I filed *Memorandum by the United States Pursuant to Court's Order of August 23, 2004* with the Clerk of the Court; such filing to be made to the following:

by electronic filing:

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and I hereby certify that I have FAXED the document to the following participants:

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Sandra M. Clanin
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND INDIANA

JOSEPH JASKOLSKI and NATIONAL INSURANCE CRIME BUREAU, an Illinois not-for-profit corporation, PLAINTIFFS, VS. RICK DANIELS, ANNA DANIELS, KENNETH DANIELS, SHARON DANIELS, LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation, THOMAS KERR, Vehicle Investigations Nationwide, Inc., an Indiana Corporation, and the AMERICAN INSTITUTE OF TOXICOLOGY, INC., an Indiana Corporation, and THE UNITED STATES OF AMERICA, DEFENDANTS.	DOCKET NO: 2:03-CV-479 RL MONDAY, AUGUST 23, 2004 8:30 A.M. PRELIMINARY INJUNCTION HEARING PAGES 1-48

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUDY LOZANO
UNITED STATES DISTRICT COURT JUDGE

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Hammond, Indiana 46320
Direct: (219) 852-6557; Fax (219) 937-5982

* * *

[30] MR. CAPP: Oh, sure.

THE COURT: And, Ms. Davilo, I'm not trying to –

MS. DAVILO: Oh, that's okay, your Honor.

THE COURT: I would rather put the heat on him, though.

MS. DAVILO: Thank you.

MR. CAPP: Preliminarily, your Honor, we would agree that your Honor's suggestion about the limited briefing is a good suggestion, because I don't believe the issue is as clear as Mr. Rubino makes it out to be; and quite frankly, it's maybe not as onerous us [sic] as Mr. Huntington makes it out to be either.

But matters occurring before the Grand Jury is a very difficult issue to parse. And while I respect them saying we are not seeking what is going on before the grand jury, the reality is here, your Honor, we had a person working hand-in-hand with the FBI on an extensive Grand Jury investigation.

So it comes very problematic for Grand Jury secrecy to start parsing the conduct of that individual, and that is the interest we seek to protect. And we acknowledge there is an issue as to Mr. Jaskolski's coverage, but the fact is he did it, and now we have some interest to protect.

THE COURT: Mr. Capp, have you had an opportunity to talk to the defendant? I'm going to call you defendants only because in this case you're defendants, okay?

* * *

No. 09-946

Supreme Court, U.S.
FILED
MAR 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH JASKOLSKI, et al.,

Petitioners,

v.

RICK DANIELS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW RESTATED

Whether Joseph Jaskolski, an investigator and salaried employee with the National Insurance Crime Bureau (NICB), should be considered by the Court to be a government employee under the Westfall Act, 28 U.S.C. § 2671, despite the fact that no court, state or federal, has ever found Jaskolski to be anything other than an employee of NICB.

Whether the Indiana Court of Appeals correctly analyzed, and ruled consistently with both *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976) in making its determination that Jaskolski was not an employee of the government, based upon the fact that the United States government had insufficient authority over him to control his detailed physical performance.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1257, which confers jurisdiction on the Court by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

I. Facts Relevant to the Petition

The facts relevant to the petition show Joseph Jaskolski is and was an investigator and salaried employee with the National Insurance Crime Bureau, and has been since 1992. (Pet. App., hereinafter App. 6-8, 49, 51, 165) (Resp. App. 2, 13-14). The National Insurance Crime Bureau (NICB) is a not-for-profit organization, funded by the insurance industry to combat insurance fraud and vehicle theft. (App. 7-8, 50, 165) (Resp. App. 2, 3).

On November 13, 1998, an "anonymous tip" came into Liberty Mutual Insurance (through discovery it was determined the tip came from another Liberty Mutual number) claiming a fraudulent and financial motive for the fire, and the NICB investigated the claim as an arson. (App. 7, 50) (Resp. App. 9-12). Jaskolski, a senior agent, investigator and employee of NICB became involved in investigating the insurance claim at the request of Liberty Mutual. (App. 8, 50-51, 165) (Resp. App. 3, 4, 10).

The work Jaskolski did in investigating or "researching" the claim was done on behalf of the National Insurance Crime Bureau. (App. 8, 32, 51) (Resp. App. 4). Jaskolski on behalf of NICB created a single case file for the Daniels' claim, which contained the original request from Liberty Mutual, and kept by Jaskolski at his home office. (App. 8, 51). Jaskolski had the discretion to decide whether or not to turn a referral into a case file as the result of research and investigation he would conduct and did not need a supervisor's approval, or Liberty Mutual's approval to make this decision. (App. 55) (Resp. App. 5, 6).

While he worked on the Daniels file, however, Jaskolski worked on "numerous other cases" simultaneously. (Resp. App. 13-14). Prior to contacting the FBI and providing them with his file, Jaskolski saw no evidence that Rick Daniels had set fire to his brother's motor home, nor had any information of financial motive for arson. (Resp. App. 9-11, 15). Despite this fact, Jaskolski took the information from his four-week-long investigation and the NICB case file and made a written investigative presentation to the FBI. (App. 8, 32, 37, 50-51, 63) (Resp. App. 4-7, 14). As was noted by the reviewing Court, Jaskolski sought out the FBI for help in the prosecution of this matter and the FBI did not seek out the help of Jaskolski, and no evidence existed for the creation of a master/servant relationship. (App. 63-64) (Resp. App. 7-8, 15-16).

During the investigation and prosecution of the Daniels brothers, Jaskolski at all times remained a

salaried employee of the NICB. (App. 8, 32, 37, 63) (Resp. App. 13). Jaskolski states that he was never actually hired, employed or paid by the FBI, nor was a formal written agreement entered. (App. 8, 37, 51, 63-64). Jaskolski received his regular salary and didn't lose any time or pay after he took his investigative file to the FBI on the Daniels case. (App. 51).

During questioning of witnesses, Jaskolski was not provided with copies of the FBI's "form 302" interview notes. (Resp. App. 9). Jaskolski testified the case was a joint investigation between NICB and the FBI and that the FBI did "80 percent" of the investigative work and he did the rest. (Resp. App. 15-16). Jaskolski was not present during the Grand Jury. (Resp. App. 17, 19-20). Following a jury trial, both Rick and his brother Bucky Daniels were acquitted on all thirty-four counts. (App. 7, 50).

From the initial request for certification to the present, the United States Attorney General has consistently opposed Jaskolski's and NICB's petition for Westfall Act certification stating that neither NICB nor Joseph Jaskolski were employees of the federal government as the Federal Investigators did not have a right to control Mr. Jaskolski's day-to-day activities. (App. 13). In addition, the facts of the case show that even while claiming to assist the FBI in its prosecution of the Daniels, Jaskolski continued to work on other NICB cases, and was introduced at the criminal trial as a representative of NICB, and is not a government employee. (App. 13, 55, 63) (Resp. App. 17-19).

II. Procedural History and Opinion Below

The case before the Court on Petition for Writ of Certiorari originated with a Complaint filed in Lake County Indiana Superior Court on December 28, 2001, by the Appellees/Plaintiffs against Joseph Jaskolski, the National Insurance Crime Bureau and other parties. (App. 7, 66). *Nearly five years later*, on June 13, 2006, both Joseph Jaskolski and the National Insurance Crime Bureau filed a petition pursuant to 28 U.S.C. § 2679, with the United States Attorney General, requesting certification of federal employee status under the Westfall Act. (App. 7, 50, 66).

The United States Attorney General refused (and to this day has refused) to certify that Joseph Jaskolski and the National Insurance Crime Bureau are employees of the government and this denial of certification was affirmed by the District Court on September 14, 2006, and the case ordered remanded to state court. *Daniels v. Liberty Mutual Ins. Co.*, 2006 U.S. Dist. LEXIS 65896 (N.D. Ind. 2006). (App. 14, 46). Jaskolski and the NICB attempted to appeal this decision to the Seventh Circuit, which dismissed the appeal for lack of jurisdiction. (App. 73).

Jaskolski and NICB then filed a Motion for Ruling on Petition for Certification under the Westfall Act in the Lake Superior Court. (App. 44). The Lake Superior Court on July 28, 2008, also denied certification. (App. 15, 44). Jaskolski appealed this denial of Westfall certification to the Indiana Court of Appeals,

which utilized the analysis found in *Logue* and *Orleans*, and affirmed the trial court's judgment holding that Jaskolski was not a government employee. *Jaskolski v. Daniels*, 905 N.E.2d 1, 20 (Ind. App. 2009). (App. 43). Jaskolski then filed a Petition for Rehearing which was denied on July 24, 2009. (App. 76). Jaskolski next filed a Petition for Transfer to the Indiana Supreme Court which was also denied on November 12, 2009. (App. 79). Petitioner Jaskolski's request for Petition for Writ of Certiorari followed.

ARGUMENT

Certiorari Is Not Warranted Because The Lower Courts' Interpretation Of The Law Is Not Contrary To The Standards Established In *Logue* And *Orleans* And The Lower Courts Correctly Found Jaskolski Not To Be An Employee Of The Federal Government Under The Westfall Act.

The Petitioner seeks a writ of certiorari from the 2009 decision of the Indiana Court of Appeals and denial of transfer by the Indiana Supreme Court, which held that Jaskolski was not an employee of the federal government. The United States Attorney General's decision now before the Court has been reviewed by both state and federal courts, de novo, and no single reviewing court has held that Joseph Jaskolski is an employee of the federal government. (App. 26, 71).

The litigation in the present case is bound by and controlled by the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the "Westfall Act." *Osborn v. Haley*, 549 U.S. 225, 127 S. Ct. 881, 887 (2007).

The Westfall Act grants to federal employees immunity from most claims which arise out of the scope of their employment. *Osborn v. Haley*, 127 S. Ct. at 887. When a civil action is brought in state court the employee being sued then requests, pursuant to 28 U.S.C. § 2679, that the United States Attorney General certify that the person named in the suit is an employee of the federal government acting in the scope of their employment. *Id.* at 888. If Attorney General Certification occurs, the matter is removed to federal court and remains in federal court, with the United States substituted as a party for the named employee. *Id.* As the Attorney General has complete discretion in such matters, the Attorney General can choose to certify anyone it chooses, and Petitioner's argument that the federal government's ability to enlist the aid of volunteers of its choosing (and thereby impairing the government's performance of its functions) is without merit.

If, however, the Attorney General declines certification, as has consistently happened in the Jaskolski case, the matter is remanded to state court. *Id.* 28 U.S.C. § 2679(d)(2) states that the certification of the Attorney General "shall conclusively establish scope of office or employment for purposes of removal." *Id.* at 890. There is no language in the statute that

requires the Attorney General to "grant certification in all cases, but instead, apparently leaves that decision to his sound discretion." *Lemley v. Mitchell*, 304 F. Supp. 1271, 1273 (D.C. Dist. 1969).

The burden of proof is, and has been, upon Jaskolski to persuade the reviewing Courts that the United States Attorney General's denial is incorrect. *Jaskolski v. Daniels*, 905 N.E.2d 1, 14 (Ind. App. 2009), *citing Palmer v. Flaggman*, 93 F.3d 196, 198-99 (5th Cir. 1996). The trial court, court of appeals, and Indiana Supreme Court all correctly found that Jaskolski and NICB failed to meet that burden.[1]

The United States Court of Appeals for the Seventh Circuit clearly ruled that NICB, Jaskolski's employer, was not, nor could not be a federal employee in that "a corporation could not be a federal employee on any understanding." *Daniels v. Liberty Mutual Insurance Co.*, 484 F.3d 884, 886 (7th Cir. 2007). (App. 68). The words "persons" as used in 28 U.S.C. § 2671 (FTCA) does not include corporations. (App. 68).

As the record is clear that Jaskolski is not an employee of a federal agency, he is required to demonstrate he is a "person acting on behalf of a

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[1] NICB and its employees even if assisting or helping the FBI cannot be a "government employee" as under the language of the FTCA, "individuals and organizations that are independent contractors are specifically not included." *Daniels v. Liberty Mutual Ins. Co.*, 2006 U.S. Dist. LEXIS 65896.

federal agency in an official capacity, temporarily or permanently in the service of the United States." *Id.*, *citing* 28 U.S.C. § 1346. (App. 62). This category of individuals is reviewed narrowly, and Jaskolski would be required to show "the authority of the principal to control the detailed physical performance of the contractor." *Jaskolski* at 14, *citing Logue v. United States*, 412 U.S. 521, 528 (1973).

The *Logue* case involved a suicide at a county jail under contract to house federal prisoners, operating under specific federal standards and rules, but without the federal government having the authority to "physically supervise the conduct of the jail's employees." *Id.* at 530. In keeping with the control holding in *Logue*, was the case of *United States v. Orleans*, 425 U.S. 807 (1976). The *Orleans* case involved a federally funded community action agency created to carry out federally created programs. *Id.* at 815. Despite the federal regulation of both groups, the employees of both were held to be contractors not agencies, and the employees of those contractors, not government employees. *Logue* at 527.

The resolution of the matter came down to whether the government supervised the day-to-day performance of the employee's work and not whether the group received "federal money and must comply with federal standards and regulations." *Orleans* at 815. Accordingly, petitioners' reliance upon *Denton v. Yazoo & M.V.R. Co.*, is misapplied, as in *Denton*, a specific statute existed which required a railroad to provide men to transport the U.S. Mail, under specific

terms, conditions and under the *direct supervision of a postal clerk*. *Id.*, 284 U.S. 305, 307 (1932). In the present case, no such statutory requirement exists and at all times Jaskolski was working for and serving the interests of his employer, the NICB, on an investigation he initiated, that predated the FBI's handling of the case. *Id.* at 305 (1932). Jaskolski has never made the requisite showing of the federal government's authority to supervise and control his work, so as to qualify as a "government employee" under the Westfall Act.

As both the district court and the Indiana appellate courts have decided, Jaskolski, is an employee of the NICB and not of the United States. In determining whether a party is a government employee, self-serving characterizations are irrelevant, and the basic test to be applied is the extent to which the federal government controls or can control the work of the party in question. *Wright v. United States*, 537 F. Supp. 568, 570 (N.D. Ill. 1982). Broad supervisory control, or potential to exercise detailed control cannot convert a contractor into an agent, nor serve as the basis for imposing vicarious liability on the United States. *Gibson v. United States*, 567 F.2d 1237, 1242 (3rd Cir. 1977).

In order to find control sufficient to establish government employment, the government must be authorized to "direct or control the day to day performance of Jaskolski's work." *Daniels v. Liberty Mutual Ins. Co.*, 2006 U.S. Dist. LEXIS 65896 *18 (N.D. Ind. 2006). While Jaskolski may allege (subjectively

and for his own benefit) that government agents controlled his work, that allegation is insufficient, as the standard requires that the FBI (objectively) had the "authority to control the physical conduct of Jaskolski." *Daniels v. Liberty Mutual Ins. Co.*, 2006 U.S. Dist. LEXIS 65896 *20 (N.D. Ind. 2006), *citing Thompson v. Dilger*, 696 F. Supp. 1071, 1075 (E.D. Va. 1988). Clearly, as Jaskolski was a salaried employee of NICB, with other duties and responsibilities to that agency, who had commenced the fraud investigation on the Daniels before the FBI's involvement, was excluded from the grand jury proceedings, and was at all times identified by the government as a NICB employee, the objective level of control does not exist over his day-to-day performance. (Resp. App. 2-19).

At all times during Jaskolski's unpaid assistance to the FBI, he remained an employee of NICB, maintained and worked on other files, and was not docked, penalized or terminated for the time spent on the Daniels' case while it was pending with the FBI. (App. 32, 51) (Resp. App. 13). As the Indiana Court of Appeals noted, Jaskolski was free at any time to withdraw his services from the FBI. *Jaskolski v. Daniels*, 905 N.E.2d 1 (Ind. App. 2009) (App. 38). It is interesting to note that neither Jaskolski nor the NICB requested certification as government employees until nearly *seven years* after the investigation and prosecution commenced against the Daniels, and so it cannot be objectively said that at the time of his actions, Jaskolski considered himself a government

employee, but only sought the legal protection of the Westfall Act once litigation commenced and he and his company realized the Daniels were seeking to hold them civilly liable.

As the requisite, objectively viewed, day to day, physical control did not exist in the present case, the Indiana Court of Appeals, following U.S. Supreme Court precedent, ruled correctly and cannot be said to have misapplied the law in the present case, or that such well-reasoned application will adversely impact the future functioning of the federal government.

The Indiana Court of Appeals did not act contrary to Supreme Court precedent and in making its ruling was provided with a large amount of evidence, in multiple volumes, consisting of pleadings, affidavits, depositions, and prior court action on the case. Petitioner Jaskolski claims he was permitted to interview grand jury witnesses, yet omits that, during this questioning of witnesses, Jaskolski was not provided with copies of the FBI's "form 302" interview notes, and was excluded from grand jury proceedings.

Jaskolski wishes to make the argument that the Rule 6(e) documents signed by him are conclusive proof that he was considered by the FBI to be a government employee. (App. 9). What Jaskolski, however, does not mention is that the document is signed on August 24, 1998, two months *before* the fire occurred that destroyed the motor home at issue, and three years *before* the lawsuit was filed by the

Daniels. This certification provided by the United States Attorney, which acknowledges that Jaskolski's "agency has assigned" him "to assist an attorney for the government" in a criminal prosecution. (App. 34, 51-52). The form itself, was not specific to the Daniels case, and makes no mention of the FBI, or that it confers any status to the agency or signatory as a governmental employee.

Jaskolski also neglects to admit that in his appeal to the Seventh Circuit, he sought to use this same document classifying himself as "government personnel" under Fed. R. Crim. P. 6(e)(2)(B). (App. 10, 33). The district court held it was "more likely than not that Jaskolski did not fit within the definition of government personnel." *Jaskolski v. Daniels*, 2:03-CV-479, slip op. p.11 August 31, 2004. (App. 10). The Seventh Circuit affirmed the decision of the district court without addressing the "government personnel" issue. (App. 11). The Rule 6(e) document was correctly considered and weighed by the Indiana Court of Appeals and no error attaches to the weight and interpretation given by that Court to that document who noted that nothing in that document conferred government employment status. *Id.* at 17. (App. 35-37).

The Indiana Court of Appeals correctly identified in its opinion that "there is no evidence, other than Jaskolski's own assertions, that the federal government exercised" control over the physical performance of Jaskolski's day-to-day activities. *Jaskolski*, at 18. (App. 62-63). From this holding, Jaskolski

argues that "unfounded evidentiary barriers" have been created by the court of appeals which will negatively impact future litigation.

Jaskolski argues that his word alone, without other evidence, should be sufficient to prove his position, but fails to regard the ten part analysis of Restatement of Agency Section 220, performed by the Indiana Court of Appeals in its opinion, which, coupled with a review of five federal court decisions, forms the basis of its holding. *Jaskolski* at 18-19. (App. 63-64). Simply put, the court of appeals applied a neutral analysis, and under that analysis, Jaskolski failed his burden of proof to show that the United States Attorney General was incorrect. *Id.* at 19. Jaskolski's failure to meet his burden does not create "unfounded evidentiary barriers." The Indiana Court of Appeals did not rule contrary to law.

The Indiana Court of Appeals, in its lengthy and detailed opinion, specifically addressed the complex issue of dual servant and borrowed servant doctrine and its applicability to the case before the Court. *Jaskolski v. Daniels*, 905 N.E.2d 1, 15-16 (Ind. App. 2009). The Indiana Court of Appeals in *Jaskolski*, citing to the Seventh Circuit, found that even if Jaskolski "could be considered a borrowed servant, such that the federal government was only his temporary employer" the standard remained "whether the temporary employer exercised such control over the conduct of the employee" as to make "the employee his servant." *Id., citing Ezekiel v. Michel*, 66 F.3d 894, 903 (7th Cir. 1995).

In making the analysis of this master-servant relationship, the Indiana Court of Appeals explored Sections 2 and 220(2) of the Restatement Second of Agency, which was the same basis for analysis used by the United States Supreme Court in *Logue* and also in *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974). *Jaskolski* at 14-16. (App. 61). The Indiana Court of Appeals correctly indicated that Jaskolski fails to address the facts of his case with respect to the Restatement of Agency 220 criteria, but instead relies upon the Fed. R. Crim. P. 6(e) document as the basis of his claim of employment. Clearly the Indiana Court of Appeals did not err in its analysis, and certiorari is unwarranted.

CONCLUSION

The Westfall Act was not created to offer the protection of sovereign immunity to any party wishing to have it. A person may have an unsupported, subjective belief that they were an employee of the federal government. This belief, absent actual objective control by the government over daily activities, is insufficient to invoke the Westfall Act. Joseph Jaskolski was an employee of the NICB. The Indiana Court of Appeals correctly applied the law and held that Jaskolski was not an employee of the government as defined by the Westfall Act. Respondents Rick

and Anna Daniels respectfully request that this Court deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

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STATE OF INDIANA)
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COUNTY OF LAKE)

IN THE LAKE SUPERIOR COURT
ROOM NUMBER FIVE
SITTING IN HAMMOND, INDIANA

KENNETH DANIELS and SHARON DANIELS,	) CAUSE NO. 45D05-9910-CP-1828
Plaintiffs	)
VS	)
LIBERTY MUTUAL INSURANCE COMPANY, VEHICLE INVESTIGATIONS, NATIONWIDE, INC., and AMERICAN INSTITUTE OF TECHNOLOGY, INC.,	)
Defendants	)

The deposition of JOSEPH J. JASKOLSKI, JR., taken at the instance of the Plaintiffs herein, pursuant to notice as to time and place and pursuant to the Statutes of the State of Indiana, before Darla R. Allen, CSR-RPR, a Notary Public for the State of Indiana, at 202 Joliet Street, Suite 2-A, Dyer, Indiana, on Wednesday, the 6th day of August, A.D., 2003, commencing at the hour of 1:45 o'clock in the afternoon.

[6] [DIRECT EXAMINATION

BY MR. VANZO:]

Q. How long did you have that position?

A. Since '92.

Q. What is the National Insurance Crime Bureau?

A. It is a non-for-profit organization funded by the insurance industry to conduct criminal investigations and to combat insurance fraud and vehicle theft.

Q. How long have you worked for – I'll call it the NICB. If I call it the NICB, you'll know what I'm talking about?

A. Yes. Clarification though. It was the ICPI, Insurance Crime Prevention Institute, and then in '92 it combined with the National Auto Theft Bureau to become the NICB.

Q. I see. So the NICB existed only since 1992?

A. Correct.

* * *

[8] [DIRECT EXAM: MR. VANZO]

Q. Did you remain the regional manager with the Insurance Crime Prevention Institute until 1992?

A. Correct.

Q. What were your duties as special agent of that organization?

A. To combat insurance fraud and to prevent vehicle theft.

* * *

[39] [BY MR. VANZO:]

Q. At some point you were involved in doing an investigation that – of something that involved Ken and Sharon Daniels; is that right?

A. Correct.

Q. Whatever work you did was that on behalf of the National Insurance Crime Bureau?

A. Correct.

Q. And if you were requested to do that, the request would have come from your superior at the NICB?

A. Correct.

Q. Is it your understanding that anything you did on behalf of the NICB was done – was instigated by the NICB itself?

A. I don't understand that question.

Q. I mean did you understand that there came a day when somebody, your superior or somebody above him, decided let's just investigate Ken Daniels?

A. I make that decision.

* * *

[40] [DIRECT EXAM

BY MR. VANZO:]

Q. You have established that the investigation – that whatever work you did with regard to Ken Daniels that it started with a request from Liberty Mutual to the NICB; is that right?

A. Correct.

Q. Was all the work you conducted on behalf of the NICB regarding Ken Daniels in response to that initial request from Liberty Mutual?

A. No.

Q. And when you say no, are you distinguishing work you may have conducted on behalf of the U.S. Attorney's Office?

A. Correct.

Q. Anyone else besides the U.S. Attorney or Liberty Mutual?

A. U.S. Attorney including the F.B.I.?

Q. Okay. Yes, the federal government.

* * *

[99] BY MR. VANZO: (continuing)

Q. So three or four weeks after a case – you opened the case file, you had – you made some referral to the F.B.I.; is that what you're saying?

A. Well, first I had to get the case file which may have took a week or two. I don't know how long. Once I got the case file, saw the inconsistency from the statements, I immediately took it over to the F.B.I. White Collar Crime Unit for additional investigation.

Q. Okay. At some point, whether it's three or four weeks or whatever it was –

A. It was three, four weeks.

Q. – you contacted the F.B.I.; is that right?

A. That's correct.

Q. Before you contacted the F.B.I., did your decision to contact the F.B.I. need to be discussed with anybody else at NICB?

A. No.

* * *

[102] [DIRECT BY MR. VANZO]

Q. Who did you contact at the F.B.I.?

A. I believe Tim Campbell was working white collar crimes at that time.

Q. Did you contact anyone at Liberty Mutual other than to request the claims file before contacting Tim Campbell?

A. No.

Q. At any time did you have any conversations with anyone at Liberty – any telephone conversation with anyone at Liberty Mutual in the period from the time you opened your file until you contacted Tim Campbell?

A. Not that I recall.

* * *

[104] BY MR. VANZO: (continuing)

Q. And I'm sorry, this interruption. I lost track. Did you say you met with Tim Campbell face to face?

A. Right, and his supervisor whoever was in charge of the Merrillville office.

Q. Okay. Did you make any record of that meeting?

A. There would be a record of that meeting, yeah. Just that I presented the investigative summary.

Q. Would that have been – you said there would be a record. Is this something that you made?

A. Yes.

Q. Okay. And is this – whatever it is you made, would that record also be in your claim file –

A. Electronic.

Q. – or case file?

A. Electronic file.

Q. Your electronic part of your case file?

A. Yes.

Q. What occurred at that meeting?

A. I virtually explained to the F.B.I. what I had and what I found, all the inconsistencies in every one of the statements. That there was a motorcycle involved. That there was a record of this motorcycle and we were bringing it to them to consider additional investigation if there was needed.

* * *

[106] BY MR. VANZO: (Continuing)

Q. You said you gave them a presentation. What else happened?

A. I believe the supervisor told Tim to open up the case in which he did.

Q. Okay. Were you somehow hired by the F.B.I. at this first meeting?

A. No.

Q. Okay. Were you given any assignment by the F.B.I. at that first meeting?

A. Just to forward any additional claim information to them when I – after I received and reviewed it.

Q. Additional claim information on this claim or other claims?

A. Other claims.

Q. But did there come a time when you were actually employed and I mean employed in the sense of being paid by the F.B.I. to conduct any further investigation regarding the Daniels?

A. Never.

Q. Did you conduct additional investigation regarding the Daniels after the date that you met with the F.B.I.?

A. Only under their direction and direct supervision.

Q. So you were under their supervision but not in their employ in connection with the investigation?

[107] A. That's correct.

Q. Is there some sort of documentation that they were supervising you in anything that you did after the initial meeting with regard to the damage?

A. I don't know what type of documentation they keep.

* * *

[119] [DIRECT BY MR. VANZO]

Q. You took no notes of your meeting with Rick Daniels?

A. Of the interview?

Q. Yes.

A. No.

Q. Did Agent Campbell take notes?

A. He did a Form 302 which is a statement form that the F.B.I. does.

Q. And would you have a copy of that Form 302 in your case file?

A. No.

Q. Do you personally have a copy of that Form 302?

A. No.

* * *

[173] [CROSS EXAMINATION BY MR. RUBINO]

Q. And what about him having other claims was significant to you?

A. It was mentioned in the hotline call that there was other stolen vehicles that were probably orchestrated by him and those claims were found.

Q. Did you find evidence, any evidence whatsoever that he had stolen or had other vehicles stolen and made fraudulent insurance claims?

A. I didn't investigate that part.

Q. Okay. So that allegation you thought was important but you didn't investigate it. What allegations are you talking about that he made other fraudulent claims?

A. I accessed the claim files but however this was the investigation I was assigned and this is the investigation I was doing.

Q. During the course of this investigation, did you find any evidence whatsoever that he in fact had made other fraudulent claims involving stolen vehicles?

A. None that was absolute.

Q. Name one that was suspicious that you had evidence [174] that there was a suspicious claim?

A. I don't recall at this time.

Q. Now this hotline – this supposed hotline call, it was an anonymous caller?

* * *

BY MR. RUBINO: (Continuing)

Q. The hotline call that was reported to you, it was by an anonymous person?

MR. BULLARO: This question was asked and answered. We spent a lot of time referring to it.

MR. RUBINO: He referred to it being a confidential informer.

MR. BULLARO: I thought he said anonymous.

THE WITNESS: Well, it wasn't reported to me. It was reported to Liberty Mutual and I believe it was anonymous.

BY MR. RUBINO: (Continuing)

Q. Did you ever learn the identity of this hotline tipster?

A. Did I, no.

* * *

[199] [CROSS EXAM BY MR. RUBINO]

Q. To your knowledge did anybody at NICB before Butler got involved ever form the belief or opinion that Ricky or Kenny Daniels set this motor home on fire intentionally?

A. No.

* * *

[202] BY MR. RUBINO: (Continuing)

Q. The question is was it your belief before you took this file to the F.B.I. that it was Kenny Daniels' expectation that he was going to get the insurance proceeds from the fire loss within a day or two to be able to get his new motorcycle?

MR. BULLARO: Make an objection. The witness has answered. That question has been asked and he answered as to the significance of the motorcycle as to being just one other factor to raise suspicion.

MR. RUBINO: You can answer.

THE WITNESS: Just one other contributing part confirming what was on the hotline call or the anonymous call.

BY MR. RUBINO: (Continuing)

Q. Okay. And so that was one of the reasons that you espoused today that you took the file to the F.B.I., [203] the fact that the motorcycle came in the day before the fire?

A. Correct.

Q. And that he might be using those proceeds from the fire loss claim to pay for the motorcycle; right?

A. That's the words of the hotline caller, not mine.

Q. Well, was it – that was one factor that had, that you believed?

A. Confirming the words of the hotline caller, not my opinion.

Q. Was that your opinion?

A. I don't make opinions like that.

Q. But you made the opinion to take the case to the F.B.I., that was your opinion?

A. Yes; that's right.

Q. At the time that you were working jointly with the F.B.I. and the U.S. Attorney as part of their team, you were being paid by NICB?

A. Correct.

Q. Getting your regular salary?

A. Correct.

Q. You weren't losing any time or pay?

A. No.

Q. You were working on other files at the time?

A. Yes.

[204] Q. How many files – during that period of time that you got the assignment from Surber to the time that you took the file to the F.B.I., how many other files were you investigating for the NICB?

A. Can I make a clarification?

Q. Yeah.

A. They're called cases.

Q. Cases?

A. They contain numerous files but the cases, about 24.

Q. And they are all fire losses?

A. No.

Q. What subjects do they cover?

A. Casualty losses, staged accidents, chiropractors inflating and unbundling their bills, the whole gambit. Slip and falls.

Q. So a lot of very complex, detailed stuff?

A. Correct.

Q. And so the Daniels' case during that – that was really about two weeks that it took you to decide to take it to the F.B.I. Is that about right?

A. No.

Q. How long?

A. About four.

Q. Okay. During this four-week time in addition to whatever work you were doing that you told us about on [205] the Daniels' case, you're also working on these other 24?

A. Correct.

Q. And how many hours a day do you work or how many hours a day did you work during that time?

A. Eight to ten.

Q. Five hours – or five days a week?

A. Sometimes six.

* * *

[222] THE WITNESS: No.

BY MR. RUBINO (Continuing)

Q. Did you ever do any background checks or any investigation into Ricky or Anna's background before you took the case to Butler?

MR. BULLARO: Other than the witness – what the witness has testified to?

THE WITNESS: Other than, no.

BY MR. RUBINO: (Continuing)

Q. At any time did you believe that, before you took the case to Butler, that Anna had anything to do with any insurance fraud?

A. No.

Q. When you said that you had taken the file to the F.B.I. and that I think you used the terms you opened up a joint investigation, could you explain what you meant by that?

A. That means that the F.B.I. and the NICB would work this case jointly.

Q. And did each party participate equally in this joint investigation?

A. I don't know if there's a gauge to say who's doing what, who's participating, but mutual agreement that we're working it together.

Q. Well, in your opinion who did most of the work, you or [223] the F.B.I.?

A. F.B.I.

Q. Now can you give us in your opinion what the percentage of the investigative work was?

A. Probably 80/20.

MR. BULLARO: 80 being who?

THE WITNESS: 80 being F.B.I.

* * *

[236] BY MR. RUBINO: (Continuing)

Q. When you took the case file to the F.B.I., you indicated that you had made a presentation to them. Could you explain what the presentation consisted of?

A. That's a Word document, template.

Q. I'm sorry?

A. It's a Word document template.

Q. What does that mean?

A. It's called an Investigative Presentation. You fill in the blanks.

Q. Okay. What, you gave them a piece of paper or file or?

A. That's right.

Q. And did you sit down and go through documents and say look at this, look at this, look at this statement, look at that inconsistency?

A. Correct.

* * *

[253] [CROSS] BY MR. RUBINO: (Continuing)

Q. – during the – during the trial of Ricky and Bucky Daniels?

A. Some of it.

Q. Did you sit at the prosecution table during the time that you were there during the trial?

A. I – sometimes maybe but mostly in the peanut gallery.

Q. During the time that you were at the trial, what interaction or involvement did you have with the prosecution?

A. Nothing.

Q. Did you assist in providing information or documents –

A. No.

Q. – for the preparation of witnesses?

A. No.

Q. Did you – were you present during any prosecution, U.S. Attorney meetings in preparation for the trial?

A. No.

Q. Did you meet with Clarence Butler during the trial?

A. No, I believe my job was to go out and get the next witness and bring them in.

Q. For the prosecution?

[254] A. Yes.

Q. You weren't doing that for the court or the defense?

A. No.

Q. So that was your role in assisting the prosecution at the trial?

A. That was about it, yeah.

Q. And when you sat at counsel table, what was the purpose of you sitting at the counsel table?

A. Don't know. Done that before at other trials.

Q. And in sitting there, you were sitting there as a representative of the NICB, is that how you were introduced to the jury?

A. I'm not sure if most of the people there knew who I was.

Q. Well, prior to the trial beginning when everybody was introduced to the jury, weren't you introduced as a representative of the National Insurance Crime Bureau?

A. I'm sure I was.

Q. And that was at trial to the jury?

A. I'm trying to think if there was formal introductions, if that's protocol, yeah, but I can't remember personally.

Q. Your best recollection is that you think that did happen?

A. I think that's protocol and probably happened at some.

* * *

[256] Q. You had indicated earlier that you were not present in the grand jury?

A. Correct.

Q. Were you present in the courthouse where the grand jury was being conducted?

A. Yes.

MR. BULLARO: Objection. And don't answer that question.

THE WITNESS: Okay.

MR. RUBINO: He has answered.

BY MR. RUBINO: (Continuing)

Q. You had earlier indicated that you were part of the investigation team and I guess I'm just curious why were you not participating inside the grand jury?

MR. BULLARO: Objection. Don't answer the question.

BY MR. RUBINO: (Continuing)

Q. After the trial did you have any communication verbally or nonverbally with Ricky or Bucky?

A. No.

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(3)

No. 09-946

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH JASKOLSKI, et al.,

Petitioners,

v.

RICK DANIELS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Daniels' Brief in Opposition ("Opp.") only serves to underscore the need for this Court's review. Even the Daniels do not attempt to defend the Indiana Court of Appeals' unacceptable notion that the government had no authority to control Petitioner Joseph Jaskolski while he assisted FBI Agent Campbell and AUSA Butler in interrogating federal grand jury witnesses or handling federal grand jury materials because Jaskolski was purportedly acting as an "independent contractor" rather than an "employee of the government" under 28 U.S.C. §2671. The very idea that there could be rogue "independent" contractors investigating and prosecuting *federal crimes*, acting independently and entirely free of any detailed control by the federal government, is absurd.

And the Daniels do not dispute that the only reason the Indiana Court of Appeals' reached such an untenable conclusion is because it wrongly superimposed on top of the burden of proof set forth in *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976) the additional requirement that Jaskolski prove the government "pressed him into service" and had the authority to "require" or coerce Jaskolski into doing things at their will. And even the Daniels do not attempt to defend the Indiana Court of Appeals' resulting conclusion that the undisputed evidence FBI Agent Campbell and AUSA Butler physically supervised and directed Jaskolski at every moment and as to every detail and that Jaskolski agreed to obey such

directions was not enough to prove Jaskolski was an "employee of the government" under §2671, *Logue* and *Orleans*.

The Daniels duck these issues entirely because they cannot possibly defend them. The Indiana Court of Appeals' superimposition of a new and unprecedented burden of proving the government shanghaied or "pressed [Jaskolski] into service" and could "require" or coerce him to act against his will is in direct conflict not only with *Logue* and *Orleans* and §2671 itself – which by its terms unambiguously includes volunteers – but also with our essential values of liberty and freedom that no person is another's slave.

Instead, the Daniels repeat here several false or unfounded contentions that even the Indiana Court of Appeals ignored. Indeed, because the Indiana Court of Appeals' central premise that Jaskolski had to prove an element of coercion could not be met by any facts, all of the Daniels' factual contentions are entirely irrelevant.

The Daniels first essentially acknowledge that the Indiana Court of Appeals applied the wrong test. While the Indiana Court of Appeals required proof of coercion, the Daniels correctly state that the correct test does not consider any element of coercion but rather only requires that the government had the authority to "physically supervise" Jaskolski's day-to-day activities. (Opp. at 8.)

But the Daniels attempt to avoid the inevitable conclusion that Jaskolski acted as an "employee of the government" by asserting that there was no federal statute *requiring* Jaskolski to follow the orders of the government. The Daniels suggest that *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932) requires the existence of such a statute before the government, as an employer, has the authority to control a volunteer such as Jaskolski.

But the Daniels' interpretation of *Denton* is not well taken. Neither *Denton* nor any other authority suggests that the right of an employer to control an employee must first be created by statute. To the contrary, as established in Jaskolski's Petition, such authority is established by the agreement of the parties.

Furthermore, the circumstances of this case establish even more strongly than those in *Denton* that the government had the authority to control. Under the statute involved in *Denton*, the government delegated certain tasks regarding the handling of mail to various railroads. The statute in *Denton* allowed the government to retain control over the details of the work by requiring the railroads to perform those tasks at the direction of a government employee.

In this case, however, no statute ever delegated to non-governmental actors the task of investigating or prosecuting federal crimes to begin with. To the contrary, pursuant to the United States Constitution and federal statute, the government always retained

exclusive control over the investigation and prosecution of federal crimes. U.S. Const., Art. II, Sec. 3; 28 U.S.C. §§507, 531, 533; *Smith v. United States*, 375 F.2d 243, 246-47 (5th Cir. 1967). Therefore, there was never any need for yet another statute to allow the government to exercise control over the investigation and prosecution of federal crimes. The authority of the government to control anyone they allowed to participate in such activities was always necessarily present and inherent in the activity itself.

The Daniels next attempt to impose an unprecedented rule of their own. According to the Daniels, Jaskolski had to present "objective" rather than "subjective" evidence. (Opp. at 9-10, 14.) The Daniels' contention is irrelevant because the Indiana Court of Appeals did not rely on, or even mention, any distinction between "subjective" or "objective" evidence. Furthermore, the cases cited by the Daniels do not mention any distinction between "subjective" and "objective" evidence.

In any event, Jaskolski presented ample evidence to "objectively" establish that the government controlled Jaskolski's actions. It is undisputed Jaskolski and the government agreed on April 1, 1999 that Jaskolski was subject to the Rule 6(e) Certification while he worked specifically on the Daniels case. (App. 142-43.) (Accordingly, that he signed the Rule 6(e) Certification earlier is irrelevant.) Consequently, if Jaskolski acted contrary to the government's directives, such as by attempting to disclose any grand

jury material, then he would be subject to criminal contempt. (App. 143; App. 162-64.)

Furthermore, Jaskolski did not testify to his "subjective" opinions or conclusions. He testified in great detail as to objective facts, including the statements made and the physical actions taken by FBI Agent Campbell and AUSA Butler, establishing the government had the authority to control his activities in the Daniels case. As just one of many examples established in the record, Jaskolski testified that FBI Agent Campbell and AUSA Butler told him which witnesses were to be interviewed, when and where they were to be interviewed, how they were to be interviewed, and what facts from those interviews were to be used. That FBI Agent Campbell and AUSA Butler always told Jaskolski what to do in every detail and that Jaskolski followed those instructions were not mere "subjective" facts existing only in Jaskolski's mind: they were objective manifestations of the agreement between Jaskolski, FBI Agent Campbell and AUSA Butler that the government had the authority to control the details of Jaskolski's work.

The Daniels' assertions that Jaskolski also did work on other cases for NICB and that he was paid by NICB are likewise irrelevant. The Indiana Court of Appeals itself necessarily recognized that, even though Jaskolski remained an employee of NICB, he still would be a borrowed "employee of the government" with respect to his activities on the Daniels case if the federal government had the authority to control those activities. (App. 29-30.) See also *Logue*

v. United States, 412 U.S. 521, 531 (1973) ("employee of the government" includes employees loaned by non-governmental employer to the government); *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 28 (1928) ("employee" includes borrowed employee); *Ezekiel v. Michel*, 66 F.3d 894, 903 n.16 (7th Cir. 1995) (that defendant was not paid by the government "of no moment" to whether he was "employee of the government"); Restatement (Second) of Agency §227, comment d.

Similarly, the Daniels' reliance on the Indiana Court of Appeals' discussion of the ten factors under Section 220 of the Restatement (Second) of Agency is misplaced. This Court and every other court has consistently recognized that the employer's authority to control the details of the work is the single most critical factor in applying the definition of "employee of the government" under §2671. See, *e.g.*, *Logue*, 412 U.S. at 526-28. The Indiana Court of Appeals itself likewise acknowledged that its analysis of Section 220's other nine factors necessarily hinged entirely on its foundational conclusion that Jaskolski had not proved the government had "pressed him into service" or could "require" or coerce him to act according to its will and thus had failed to establish the primary factor of control. For example, in analyzing one of the ten factors, the Indiana Court of Appeals conceded that "the federal prosecution of a purported criminal is 'the kind of occupation' one would expect to occur 'under the direction of the employer'" – that is, the

government. (App. 37.) The court nonetheless concluded that this factor did not weigh in favor of Jaskolski solely because the government did not "require" or coerce Jaskolski to act and thus Jaskolski purportedly had not demonstrated the primary factor that the government directed his actions. (*Id.*)

Finally, the Daniels unnecessarily engage in a series of misrepresentations regarding the facts. As demonstrated above, the Indiana Court of Appeals' opinion essentially renders any and all facts irrelevant to the definition of "employee of the government" under §2671 by imposing an impossible burden of proving coercion; there are no facts which could ever demonstrate the government had the authority to "require" or coerce a volunteer such as Jaskolski to act. Nevertheless, solely in order to avoid even the possibility of any unfair prejudice to Jaskolski, this Reply Brief will present the accurate facts.

The Daniels first misstate the record by suggesting that the "work Jaskolski did in investigating or 'researching' the claim was done on behalf of the National Insurance Crime Bureau. (App. 8, 32, 51) (Resp. App. 4)." (Opp. at 2.) The pages of the appendix cited by the Daniels do not support their contention and indeed the undisputed facts establish the exact opposite. Jaskolski testified that his initial investigation started with a request from Liberty Mutual to NICB, but that after the government decided to open its own investigation on April 1, 1999, all of his work was done on behalf of and under the control of

the federal government. (App. 142-43; App. 153-54; Resp.App. 4.)

Jaskolski has always asserted he was an "employee of the government" only for those activities he undertook beginning April 1, 1999 at the government's request and pursuant to its direction and control. Therefore, all of his activities prior to April 1, 1999 are irrelevant to this appeal.

The Daniels next misleadingly suggest that "the United States Attorney General has consistently opposed Jaskolski's and NICB's petition for Westfall Act certification" "to the present." (Opp. at 3.) That is not correct.

To begin with, the United States has never disputed the essential fact that it physically supervised every detail of Jaskolski's involvement in the investigation and prosecution of Rick Daniels. To the contrary, the United States *admitted* Jaskolski always acted under the direction of either FBI Agent Campbell or AUSA Butler and that it treated Jaskolski as "government personnel." (App. 166.)

Instead, the United States only took the untenable legal position – and even then only in the federal district court – that these undisputed facts were not enough to establish Jaskolski was an "employee of the government" only because FBI Agent Campbell and AUSA Butler did not have the authority to coerce Jaskolski to act against his will. After the federal district court's decision, the United States has never again asserted such a legal argument and indeed has

not filed in either the Indiana state courts or this Court any brief substantively opposing Jaskolski's attempt to be certified as an "employee of the government." Whether such silence represents an abandonment of its earlier position combined with a perhaps understandable reluctance to change the status quo and accept liability for its control over Jaskolski is unclear, but at the very least the Court should ask the United States to state its position before ruling on this Petition.

The Daniels also falsely assert that Jaskolski did not seek certification as an "employee of the government" until "five years" after they filed the underlying lawsuit. (Opp. at 4.) There is no relevance to such an assertion but it is false in any event. Jaskolski sought certification shortly after the Daniels sued him, and there was no need to seek such certification prior to being sued. (App. 94.) The Attorney General took almost two years to consider Jaskolski's request and Jaskolski filed his Westfall Petition in the Indiana state court within two months of the Attorney General's decision. (App. 80.)

Lastly, the Daniels falsely allege that Jaskolski did not have any "evidence" that Rick Daniels was involved in the arson of his brother's vehicle when he took the results of his investigation to FBI Agent Campbell. (Opp. at 2.) The pages of their appendix cited by the Daniels do not support such a proposition. As such a misrepresentation is irrelevant in any event, no purpose would be served by adding here the pages of the record on appeal establishing the truth

that Jaskolski presented ample evidence of arson to FBI Agent Campbell on April 1, 1999. Nevertheless, it is highly objectionable for the Daniels to insinuate that the United States Attorney opened a criminal investigation without having any evidence before it suggesting a crime was committed.

CONCLUSION

Wherefore, Petitioners Joseph Jaskolski and the National Insurance Crime Bureau respectfully pray that this Honorable Court grant this Petition and issue a writ of certiorari to the Indiana Court of Appeals, that this Court order the reversal of the April 24, 2009 decision of the Indiana Court of Appeals, and enter in lieu thereof a judgment certifying that Jaskolski was an "employee of the government" under 28 U.S.C. §2671 with regard to all of his activities related to the Daniels case beginning April 1, 1999, and ordering the substitution of the United States as a party defendant in place of Jaskolski for all

allegations regarding Jaskolski's activities after April 1, 1999, and granting such other relief as this Court deems just.

Respectfully submitted,

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